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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 538

WILLIAM CALVARESI and JERRY BENALLO, JR.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Joint and Several Petitions for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1954

No.

WILLIAM CALVARESI and JERRY BENALLO, JR.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Joint and Several Petitions for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the District of Colorado, convicting the petitioner William Calvaresi of the offenses of obstructing the due administration of justice in violation of 18 U.S.C. 1503, in two counts; offering a bribe in violation of 18 U.S.C. 206, in two counts; and, in two counts, of a conspiracy to commit each of the foregoing offenses in violation of 18 U.S.C. 371. The petitioner Jerry Benallo, Jr. was also con-

victed of the offense of obstructing the due administration of justice in violation of 18 U.S.C. 1503; offering a bribe in violation of 18 U.S.C. 206; and, in two counts, of a conspiracy to violate 18 U.S.C. 1503 and a separate conspiracy to violate 18 U.S.C. 206, in violation of 18 U.S.C. 371.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A in the joint appendix of the petitioners William Calvaresi and Jerry Benallo, Jr., and the petitioners Eugene Smaldone and Clyde George Smaldone. No opinion was written by the District Court. The convictions giving rise to this petition are the outgrowth of the consolidated trial and the consolidated appeal of indictments returned against William Calvaresi, Jerry Benallo, Jr., Eugene Smaldone, Clyde George Smaldone and Michael J. Benallo. In the trial court, all of the defendants were found guilty. The Court of Appeals reversed the conviction of Michael J. Benallo. A certified copy of the transcript of record from the United States Court of Appeals for the Tenth Circuit, together with nine copies of the transcript of record, have been filed with the clerk of this Court. The consolidated opinion and judgments of the Court of Appeals for the Tenth Circuit has resulted in two joint petitions for writs of certiorari. William Calvaresi and Jerry Benallo, Jr. have jointly petitioned for a writ of certiorari. Eugene Smaldone and Clyde Smaldone will also present a joint petition for a writ of certiorari. Both the petition of William Calvaresi and Jerry Benallo, Jr. and the petition of Eugene Smaldone and Clyde George Smaldone will rely on the consolidated record, and the joint appendix which has been prepared for this Court.

JURISDICTION

The Court of Appeals entered judgment against both of the petitioners on November 2, 1954, and the petition for rehearing filed by William Calvaresi and Jerry Benallo, Jr. was denied on November 16, 1954. (See Appendix B and C of the joint appendix.) The time for filing this petition for writ of certiorari has been extended to January 15, 1955, and the order extending the time appears as Appendix D in the

joint appendix filed with this petition. This petition for writ of certiorari is filed within the extended time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also, Rules 37 (c) and 45 (a), Federal Rules of Criminal Procedure, and Rules 22 (2) and 46 of the Revised Rules of the Supreme Court of the United States. Title 18, Sec. 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED AND HOW RAISED

I.

Indictment No. 13800 charges a conspiracy in two counts: one count charges a conspiracy to obstruct the due administration of justice by endeavoring to influence a juror, and the other charges a separate conspiracy to offer a bribe to a juror (112).* All of the evidence undisputedly indicates that the petitioner William Calvaresi told his neighbor, Mrs. Effie B. Alsup, who was a member of the jury panel, that Eugene Smaldone had been in the neighborhood and had asked him to see her and offer her $250.00 to sit down on the jury, and that on September 9, 1953, he renewed the offer (324, 351, 494). The undisputed evidence shows that Jerry Benallo, Jr. also talked to Mrs. Alsup on September 17, 1953, and told her that the Smaldones were not all bad, and that the Smaldones would have a nice gift for her if she would string along with them (325, 494). No other evidence in the record relates to either of the petitioners and no evidence was adduced at the trial to connect the petitioners with each other.

Both of the petitoners were tried, convicted and sentenced on both counts of the indictment and the undisputed evidence indicates that both counts of the indictment were based on the same transactions or occurrences (494).

In construing conspiracy indictment 13800, the court below points out that the general scheme of the conspiracy was to secure the release of Eugene Smaldone in the criminal case which was pending against him by bribing and corrupting members of the jury panel, and held that there was but one conspiracy (502). The petitioners were convicted and sen-

* Numbers appearing herein within brackets refer to pages of the consolidated printed record in these cases.

tenced as members of two separate and distinct conspiracies, and the convictions were sustained by the court below.

Therefore, the question is, were the petitioners' rights substantially prejudiced when they were indicted, tried, convicted and sentenced as members of two conspiracies, when the evidence undisputedly shows that both conspiracies are based on the same transactions or occurrences, and the court below has held that there was but one conspiracy?

II.

The undisputed evidence indicates that both the June jury panel that heard the first Eugene Smaldone tax evasion case and the September jury panel called for the retrial of the same case were importuned. Seven disconnected occurrences centering around the Eugene Smaldone tax evasion trials were shown by the undisputed evidence. Three transactions relate to the June trial which ended with a hung jury and four transactions concern the retrial which was scheduled for September 21, 1953, and never held. The first evidence in the record relating to jury tampering involves the two visits that William Calvaresi made to Effie B. Alsup (323-332). The second occurrence concerns Jerry Benallo's conversation with Mrs. Alsup on September 17, 1953, and is in no way connected with William Calvaresi or any other defendant on trial (329-330). The evidence relating to a third effort to importune a member of the jury panel is the outgrowth of the attempt made by Raymond J. SaBell to bribe Frank P. Rossi and is in no way connected to either of the petitioners (360-370). John H. McCusker supplied the evidence of a fourth transaction by the testimony relating to his efforts to bribe Elizabeth Buschbach through her father (425-428). The first four attempts to importune all related to the September jury panel. The remaining three attempts involved the June jury panel. The fifth transaction involved W. E. Lawson, Fiore Smaldone and Louis Smaldone and their efforts to bribe Owen Spencer (402-418). The evidence of a sixth occurrence was supplied by Caroline A. Baer when she testified that after she had been dismissed from the jury panel she was approached by Fiore Smaldone, who was not on trial (374-395). The seventh and last act of importuning occurred

when Michael J. Benallo asked Merle D. Hall if he remembered him when he worked at the fish hatchery (395-399).

Therefore, the question is, did the trial judge abuse his discretion and substantially prejudice the rights of the petitioners by forcing them to trial on seven disconnected conspiracies that were charged in the terms of separate and distinct violations of 18 U.S.C. 371, by an agreement to violate 18 U.S.C. 1503 and an additional agreement to violate 18 U.S.C. 206, when the conspiracy was consolidated for trial with substantive offenses against the petitioners and the convicted Smaldone brothers?

III.

Indictment No. 13777 and Indictment No. 13778 charge substantive offenses against each of the petitioners, and Indictment No. 13800 charges a conspiracy against the petitioners and five other defendants (10, 75, 112). Indictment No. 13777 charges William Calvaresi in two counts with obstructing the due administration of justice in violation of 18 U.S.C. 1503 and in two counts, both based on the same acts that resulted in the first two counts of the indictment, with offering a bribe in violation of 18 U.S.C. 206 (10, 494). Indictment No. 13778 charges Jerry Benallo, Jr. in one count with obstructing the due administration of justice in violation of 18 U.S.C. 1503, and in count two, which was predicated on the same transaction, charges a violation of 18 U.S.C. 206 (494). The same acts which formed a basis for the substantive indictments against the petitioners are alleged as overt acts in conspiracy Indictment No. 13800 (233).

Besides the substantive indictments and the conspiracy indictment upon which they were tried, convicted and sentenced, the petitioners are named in four other conspiracy indictments which are still pending before the court (67, 81, 148). Conspiracy Indictment No. 13833, which is still pending, is identical with the conspiracy indictment upon which the petitioners were convicted, except that an additional party is named in conspiracy Indictment No. 13833 and two additional overt acts are alleged (112, 148). The evidence against the petitioners undisputedly shows that all of the indictments arise out of the two conversations that William Calvaresi

had with Mrs. Effie B. Alsup and one conversation that Jerry Benallo, Jr. had with Mrs. Alsup (323-356).

The petitioners directed a motion for a bill of particulars to each indictment, requesting the name of the juror importuned, the method used to influence or impede the juror or jurors, the nature and kind of bribe allegedly offered, and the motions were summarily overruled (66, 80, 124, 70, 82, 135). The petitioners also made a motion to dismiss the indictments for failure to state an offense against the United States before the case was submitted to the jury, and renewed their motion to dismiss and motion for a bill of particulars at the time sentence was imposed on November 23, 1953, and the motions were denied (70, 71, 82, 135, 446, 492, 498).

Therefore, the question presented here is, are the indictments so vague and indefinite that they fail to charge an offense against the United States and violate the accused's Constitutional right to be informed of the nature of the charges against him?

IV.

The court below has sustained the convictions and sentences of the petitioners on the substantive indictments which charged violations of 18 U.S.C. 1503 and 18 U.S.C. 206. The court below has found that the same act or acts formed the basis for charging a violation of both 18 U.S.C. 1503 and 18 U.S.C. 206 (494). The evidence shows that William Calvaresi attempted to bribe Mrs. Effie B. Alsup, who had been summoned to the jury panel, on two occasions, and that Jerry Benallo, Jr. offered her a nice gift on one occasion (324-330). The record indicates that Mrs. Alsup was summoned to the jury panel but never actually served as a juror (326).

Therefore, the question is, is a juror within the contemplation of 18 U.S.C. 206 any member of the jury panel, or a member of the jury panel that has been duly selected and sworn to hear and determine the issues in an actual trial before the court?

V.

Every defendant in the consolidated cases filed an affidavit and motion for change of judge in the substantive cases and in each of the conspiracy cases, and the motions were summarily denied (18, 79, 93, 105, 132, 70, 82, 96, 107, 135, 191, 194). The opinion of the court below points out that many of the events complained of by the petitioners as indicating bias and prejudice on the part of the trial judge were discretionary and occurred after the beginning of the trial and could not have formed the basis of an affidavit of bias and prejudice before the trial (504). Appendix F in the joint appendix contains a summary of the acts of the trial judge which would tend to show the bias and prejudice that he manifested toward both of the petitioners in the course of the trial.

Therefore, the question is, whether a reviewing court should examine the record to determine whether prejudice was manifested toward a defendant in the trial of a case by erroneous rulings of the trial judge, and by his manner and demeanor, after he has overruled an affidavit and motion for his disqualification, filed by the same defendant, on the ground that the affidavit was not legally sufficient.

VI.

Prior to trial, the petitioners and all of the defendants filed motions for transfer to another district for trial, and the motions were denied (52, 80, 93, 105, 132, 70, 82, 96, 107, 135). The motions were supported by Exhibit A, which contains a few of the hostile newspaper articles which were published about the case in the Denver area and throughout the entire State of Colorado. Exhibit A has been certified to this Court and is on file in the Clerk's office.

The petitioners also made a motion for a continuance prior to trial, and the motion was denied (229).

In the selection of a jury, twenty-two jurors admitted actual bias and prejudice when examined by the court on the *voir dire* (244-321). The jury that was selected for the trial of the consolidated cases found every defendant guilty of every act charged (71, 82, 97, 107, 135).

The opinion of the court below indicates that the motion was wholly discretionary and that there was no evidence of any abuse of discretion, and yet found that there was no evidence to sustain the conviction of Eugene Smaldone on eight counts of Indictment No. 13794 and not one scintilla of evidence to sustain the conviction of Michael J. Benallo on conspiracy Indictment No. 13800 (503, 517, 518).

Therefore, the question is, did the trial judge abuse his discretion and deny the petitioners a fair trial when he summarily overruled their motions for transfer to another district and refused to grant a continuance?

VII.

This joint petition for a writ of certiorari has many questions in common with the joint petition for a writ of certiorari which will be filed on behalf of Eugene Smaldone and Clyde George Smaldone. In the court below, William Calvaresi, Jerry Benallo, Jr., Eugene Smaldone, Clyde George Smaldone and Michael J. Benallo filed a joint and consolidated brief. The questions presented in this joint petition and the questions presented in the joint petition of Eugene Smaldone and Clyde George Smaldone are also an outgrowth of the consolidated trial, and necessarily many of the questions presented to this Court are the same.

Therefore, the petitioners incorporate by reference in this petition the questions presented in the joint petition for a writ of certiorari which will be filed on behalf of Eugene Smaldone and Clyde George Smaldone.

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 18, Crimes and Criminal Procedure, and particularly Sections 1503, 206 and 371, and Title 28, Judiciary and Judicial Procedure, Section 144; Federal Rules of Criminal Procedure, Rules 7 (f), 12 (b) (2), 21 (a) and 32. The pertinent portions of the Statutes are lengthy and are printed as Appendix E in the joint appendix filed by the petitioners William Calvaresi and Jerry Benallo, Jr., and the petitioners Eugene Smaldone and Clyde George Smaldone.

STATEMENT OF THE CASE

The Facts

William Calvaresi is 36 years of age and has lived in Colorado his entire life (43, 14). He owns and operates the Friendly Tavern and his record is only blemished by a fine for possession of slot machines in 1947 (43, 349).

Jerry Benallo, Jr. is 41 years of age and was born and raised in Adams County, Colorado (78). He has been employed by the Union Pacific Railroad Company in the capacity of a warehouseman for ten years, and prior to that time made his living as a farmer (78). His record is unmarred except for a misdemeanor which he committed some nineteen years ago when he shot four ducks out of season (78).

The convictions of the petitioners center around Effie B. Alsup and the re-trial of the Eugene Smaldone tax evasion case (323-356, 113). The first trial of Eugene Smaldone for tax evasion ended with a hung jury on June 12, 1953 (443). Thereafter, the re-trial of the tax evasion case was set for September 21, 1953 (113). Mrs. Effie B. Alsup was summoned to the jury panel scheduled to hear the re-trial of the tax evasion case. She received her summons to jury service in the United States District Court for the District of Colorado on August 22, 1953, but was never selected or sworn as a juror to try any case (326, 11, 76).

Mrs. Alsup testified that she lives directly behind William Calvaresi's house in DuPont, Colorado, and has known him for nearly ten years as a friendly neighbor (323, 326, 327). She testified that on September 7, 1953, William Calvaresi came to her home and told her that Checkers Smaldone had been in the neighborhood and had asked him to see her and offer her $250.00 to sit down on the jury (324, 351). She said that William Calvaresi returned on September 9, 1953, and again told her that she would receive $250.00 if she would sit on the jury (324). She then testified that she told William Calvaresi that she did not expect to serve on the jury because of heart trouble (328). William Calvaresi thereupon told Mrs. Alsup that he hoped she would get off the jury so that they could both be out of the thing altogether (352).

Paul E. Bush, an agent for the Federal Bureau of Investigation, testified as to the oral confession that William Calvaresi made concerning his conversations with Effie B. Alsup (346-356). He testified that William Calvaresi told him that Eugene and Clyde Smaldone came to see him the first week of September, and discussed the Federal income tax trial against Eugene Smaldone (349). He stated that William Calvaresi said that the Smaldones told him that Effie B. Alsup was a member of the jury panel scheduled to appear on September 21, 1953, and asked him if he knew Mrs. Alsup. He testified that William Calvaresi said that Eugene Smaldone told him to contact Mrs. Alsup and ask if she would help him in his income tax trial (349). He stated further that William Calvaresi said that Eugene Smaldone mentioned that he would make it right with Mrs. Alsup afterwards (350). He also testified William Calvaresi said that he went to see Mrs. Alsup on the 5th or 7th of September and talked to Barbara Clark, her daughter, when he discovered that Mrs. Alsup was not home (350). He then testified that William Calvaresi said that he later talked to Mrs. Alsup and that on the 9th or 10th of September, 1953, Clyde and Eugene Smaldone again came to his tavern and asked him if he had contacted Mrs. Alsup and at their instance talked to Mrs. Alsup again the next day (351). He also said that William Calvaresi remarked that Clyde Smaldone and Eugene Smaldone had asked him whether Jerry Benallo, Jr. knew Mrs. Alsup and that he had said that he thought that Jerry Benallo, Jr. did (352).

Jerry Benallo, Jr.'s conviction stems from his conversation with Mrs. Alsup on September 17, 1953. Mrs. Alsup's testimony indicates that she had known Jerry Benallo, Jr. for some years in connection with community affairs, and that on September 17, 1953, he came to see her about 8:00 in the morning and told her that the Smaldones would have a nice little gift for her if she would string along with them (325).

She said that Jerry Benallo, Jr. stated that the Smaldones weren't all bad, that they were good contributors to their church and did a lot of other things like that, and that he didn't think they were all to blame (330). She said that she told Jerry Benallo, Jr. that she wasn't going to sit on the jury if she could get off of it (331).

Mrs. Alsup testified that both William Calvaresi and Jerry Benallo, Jr. talked to her at times when her entire family was present (324). She also testified that neither William Calvaresi nor Jerry Benallo, Jr. attempted to influence her conduct as a juror and did not intimidate or threaten her or try to be secretive (327-331).

At the time that she was visited by the petitioners, Barbara Clark, her daughter, Ivan K. Clark, her son-in-law, and Don Thomas Alsup, her son, were present (324).

No witnesses were produced by the petitioners other than character witnesses. William Calvaresi offered as character witnesses Earl Andrews (451) and Milton Berger (452), and their testimony indicated that he had a good reputation as a peaceful and law-abiding citizen. Jerry Benallo, Jr. offered similar testimony, and produced as character witnesses Denver Truman Black (447-449), Earl Andrews (449) and William F. Priest (450).

In the trial of the consolidated cases, the United States called as witnesses Effie B. Alsup (323-332), Barbara Clark (333-336), Ivan K. Clark (336-341), Don Thomas Alsup (341-346), Paul E. Bush (346-356), Leo D. Walton (356-360), Frank P. Rossi (360-364), Raymond J. SaBell (364-370), Randolph Roland (370-374), Robert E. Ditter (testimony was stricken and does not appear in the printed record), Caroline A. Baer (374-385), Benjamin F. Baer (388-395), Merle D. Hall (395-397), Fay Hall (397-399), Willis M. Farrell (399-400), Helen D. Flanagan (400-402), Owen Spencer (402-410), W. E. Lawson (410-418), Ruth Burton (419-423), John Gilbert Whisler (423-424), Anthony E. Buschbach (425-430, 436-438), John H. McCusker (430-436), William Graf (438-445).

Of the witnesses called, the testimony of Robert E. Ditter, Helen D. Flanagan, Ruth Burton and John Gilbert Shisler was stricken and the jury instructed to disregard it (404, 424).

Effie B. Alsup, Barbara Clark, Ivan K. Clark, Don Thomas Alsup, and Paul E. Bush testified as to conversations of William Calvaresi and Jerry Benallo, Jr. Leo D. Walton, Frank P. Rossi and Raymond J. SaBell testified only about the conduct of Eugene Smaldone and Clyde George Smaldone, and did

not refer to either of the petitioners. Randolph Roland testified only about a conversation with Clyde George Smaldone. Caroline A. Baer and Benjamin F. Baer testified only as to the conduct of Fiore Smaldone, who was not on trial in the consolidated cases. Merle D. Hall, Fay Hall and Willis M. Farrell testified only as to a conversation with Michael J. Benallo, and no mention was made of either of the petitioners, or Federal court trials or jury service. Owen Spencer testified only as to the conduct of W. E. Lawson. W. E. Lawson testified only as to the conduct of Clyde George Smaldone, Fiore Smaldone and Louis Smaldone. Anthony E. Buschbach testified about a conversation with John H. McCusker. John H. McCusker testified as to the conduct of Eugene Smaldone and Joseph Cefalu. William Graf testified only as to court records.

FORM AND HISTORY OF ACTION SHOWING JURISDICTION IN COURTS BELOW

On September 21, 1953, an indictment was filed in cause number 13777 charging William Calvaresi in two counts with the crime of obstructing the due administration of justice in violation of 18 U.S.C. 1503, and in two counts with offering a bribe in violation of 18 U.S.C. 206 (10-12).

On the same day, an indictment containing two counts was filed in cause number 13778 charging Jerry Benallo, Jr. with obstructing the due administration of justice in violation of U.S.C. 206 (75-76).

On September 21, 1953, the Court set the bond in cause number 13777 and 13778 at $50,000.00, and then *sua sponte* increased the bond in causes numbered 13777 and 13778 to $100,000.00, and made a like increase in causes numbered 13775 and 13776 then pending against Eugene Smaldone, Clyde George Smaldone, William Calvaresi and Jerry Benallo, Jr. (12), which at this time are not before the Court but were included in the order increasing bail in the following words:

> "Bonds increased from $50,000.00 to $100,000.00, that Defendants be arraigned Wednesday, 9/23/53, at 9:30 A.M. and that date of trial thereafter be set for Monday, 9/28/53, at 9:30 A.M. Same order applies in

each of the above cases—(Done in chambers at 5:30 P.M. Information to be given to the Press)" (12).

On September 23, 1953, William Calvaresi and Jerry Benallo, Jr. were arraigned and entered pleas of not guilty to substantive indictments number 13777 and 13778 (13, 76).

On September 28, 1953, an indictment was filed in cause number 13800 charging Eugene Smaldone, Clyde George Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone and Michael J. Benallo, in two counts, with a conspiracy to violate 18 U.S.C. 1503 and a separate conspiracy to violate 18 U.S.C. 206, both conspiracies being in violation of 18 U.S.C. 371. The first count of the indictment charged a conspiracy to violate 18 U.S.C. 1503 by obstructing the due administration of justice and the second count charged a conspiracy to violate 18 U.S.C. 206 by offering a bribe, each count setting forth twenty overt acts (112-121). Bond was set for each defendant on September 28, 1953, at $200,000.00 (121).

On October 1, 1953, the petitioners were arraigned and pleaded not guilty to cause number 13800 (122).

The petitioners William Calvaresi and Jerry Benallo, Jr. filed motions for reduction of bail (13, 77). On October 2, 1953, the Court held the motions in abeyance until the Government furnished the Court with certain information (17, 122). On October 15, 1953, the Court denied the motions for reduction of bail of both William Calvaresi and Jerry Benallo, Jr. (18, 79, 122).

On October 15 and 16, 1953, the defendants each filed the following:

1. Affidavit and motion for change of judge (18, 79, 93, 105, 132). The official transcript referred to in the affidavits and motions (24) appears at (25-51).

2. Motion for transfer to another district, supported by exhibit consisting of a group of newspaper clippings (52, 80, 93, 105, 132).

3. Motion for bill of particulars (66, 80, 92, 106, 122, 124, 128, 130).

In addition, on October 16, 1953, William Calvaresi, Jerry Benallo, Jr., and Michael J. Benallo each filed motions in cause numbered 13800 for relief from prejudicial joinder (126, 128, 131).

On October 16, 1953, an indictment was filed in cause numbered 13833 charging Eugene Smaldone, Clyde George Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, Michael J. Benallo and Joseph Cefalu, with violating 18 U.S.C. 371, in two counts, the first count charging a conspiracy to violate 18 U.S.C. 1503 by obstructing the due administration of justice, and the second count charging a conspiracy to violate 18 U.S.C. 206 by offering a bribe. Both counts of the indictment set forth twenty-two overt acts (148-158). Bail for each defendant was set at $200,000.00 (158).

On October 20, 1953, the United States Attorney filed his answer to the individual affidavits and motion for disqualification of the Honorable Willis W. Ritter (51, 80, 93, 105, 132), and on October 21, 1953, filed his answer and affidavit to the motions for transfer to another district (54, 80, 93, 105, 132).

On October 21, 1953, the petitioners were arraigned in cause number 13833 and Eugene Smaldone and Clyde George Smaldone entered pleas of guilty to the two conspiracy counts in the indictment, and the petitioners entered pleas of not guilty (159-165).

The petitioners William Calvaresi and Jerry Benallo, Jr. appealed the ruling on their motion for reduction of bail to the United States Court of Appeals for the Tenth Circuit, and on October 21, 1953, the Court of Appeals reduced the bail of the petitioners to $25,000.00 in cause number 13800, and ordered that they be discharged on their own recognizance in causes numbered 13775, 13777, 13778, 13779 and 13793 (18).

On October 22, 1953, the United States Attorney filed his motion to join causes numbered 13777, 13778, 13794, 13795, 13796, 13797, 13801, 13802, with case 13800 for trial (69, 82, 93, 106, 132).

The United States Attorney, on October 22, 1953, also filed a motion to sever Eugene Smaldone and Clyde George

Smaldone in cause number 13800 from trial with the other defendants on the ground that they had previously entered pleas of guilty to a similar conspiracy indictment in cause number 13833 (133).

On October 23, 1953, the United States Attorney filed another motion to consolidate wherein he asked that causes numbered 13794, 13795 and 13800 be joined for trial (93, 106, 133).

On October 26, 1953, the defendants Eugene Smaldone and Clyde George Smaldone filed pleas of former jeopardy in causes numbered 13800, 13794, 13795 (94, 107, 133).

On October 26, 1953, the court entered orders denying the motions of defendants for change of judge, for transfer to another district, and for bills of particulars (70, 82, 96, 107, 135). At the same time, the trial court also denied the motions of William Calvaresi, Jerry Benallo, Jr. and Michael J. Benallo for relief from prejudicial joinder in cause number 13800 (135). The court reserved ruling on the pleas of former jeopardy of Eugene Smaldone and Clyde George Smaldone in cause number 13800 (135).

On October 26, 1953, the United States Attorney made an oral motion to withdraw all motions to consolidate for trial (70, 82, 96, 107, 135, 228), and an oral motion to withdraw his motion to sever Eugene Smaldone and Clyde George Smaldone in cause number 13800 for trial (229), and his motions were granted by the court (229, 238).

The United States Attorney then made an oral motion to consolidate causes numbered 13777, 13778, 13794, 13795, and 13800 for trial (229-230), and the motion was granted by the court (70, 82, 96, 107, 135, 238). Counsel for the petitioners thereupon made a motion for a continuance in view of the many motions to consolidate, and the motion was denied (229, 243).

On October 26, 1953, before the trial of the cases against the defendants was commenced, the United States Attorney filed a motion and a notice was signed by the court bearing the caption of causes numbered 13794, 13795 and 13800, and was served upon each of the defendants, charging criminal contempt of court and ordering the defendants to forthwith

show cause why they should not be punished for criminal contempt (172-173, 174). Thereafter, upon the motion of the United States Attorney, the court ordered that each of the defendants be taken into custody by the United States Marshal and held under a bond of $25,000 (190). Counsel for the defendants interposed objections to the contempt proceedings and contested the sufficiency of the notice and motion in the light of Rule 42B of the Federal Rules of Criminal Procedure (195-207). The court at that time suggested that the United States Attorney re-examine the motion and notice to bring it into conformity with the provisions of Rule 42B of the Federal Rules of Criminal Procedure (207).

On October 27, 1953, the petitioners objected to proceeding with the trial until the pleas of former jeopardy filed by Eugene Smaldone and Clyde George Smaldone were heard and disposed of by the court (239-240), and the objection was overruled (243).

Eugene Smaldone and Clyde George Smaldone also moved for continuance of the trial after the District Attorney moved to sever them from trial in cause number 13800, and their motion was denied (242-243).

On October 27, 1953, the United States Attorney filed answers to the pleas of *autre fois convict* that had been filed by Eugene Smaldone and Clyde George Smaldone (95, 107, 134).

On October 27, 1953, a new notice was issued by the court superseding the notice served upon the defendants on October 26, 1953, directing the defendants to appear on November 2, 1953, to show cause why they should not be punished for criminal contempt (175).

On October 27, 1953, causes numbered 13777, 13778, 13794 and 13800 were called for trial and a jury of 12 was impaneled and sworn to try said causes (243-321).

In the selection of a jury, 57 jurors were called into the box and examined by the court. Twenty-two were dismissed by the court for prejudice, one was dismissed by the court because of Government employment, and one was dismissed by the court because he was being investigated by the Bureau of Internal Revenue and knew counsel. Fifteen of the pros-

pective jurors were excused by the defendants exhausting their peremptory challenges, and six were excused by the Government (243-321).

On October 27, 1953, trial was commenced of the consolidated cases, and the cases were presented to the jury for deliberation on October 29, 1953, and at 9:51 p.m. the jury returned verdicts finding all of the defendants guilty of each and every count charged (71, 82, 97, 107, 136).

All of the defendants were then taken into custody, and thereafter, on November 2, 1953, again appeared before the court to stand trial for criminal contempt, and the United State Attorney offered the transcript of the proceedings of the foregoing trial as evidence of contempt (462). Counsel for petitioners, in attempting to comply with the court's order that cause be shown why the petitioners should not be punished for criminal contempt, moved the dismissal of the order to show cause on the ground that the acts charged as contemptuous did not occur in the presence of the court (462). After the court heard arguments by the United States Attorney and counsel for the defendants, the court ordered the United States Attorney and the defendants to supply him with memoranda concerning the law of contempt (468), and, after the memoranda had been supplied, found all of the defendants in contempt of court, on November 23, 1953 (186, 486).

On November 23, 1953, the court ruled on the motions for judgment of acquittal, motions to dismiss, motions for bill of particulars, and pleas of *autre fois convict*, and entered judgment against all of the defendants (471-474). (The date appearing in the printed record is November 2, 1953, rather than November 23, 1953, the date on which the proceedings were held.)

William Calvaresi was sentenced by the judgment of the court to a term of fifteen years and a fine of $5,000 on commitment in cause numbered 13777. In cause numbered 13800, he was sentenced to an additional five years on each count of the indictment and the terms were suspended (72, 480).

Jerry Benallo was sentenced by the judgment in cause numbered 13778 to a term of fifteen years and fined $5,000,

with the fine to be on commitment (82, 481). In addition to the foregoing, he was sentenced to ten years by the judgment of the court in cause numbered 13800 and the term was suspended. He was also fined $5,000 in cause numbered 13800, with the fine to be remitted if the fine was paid in cause numbered 13778.

In addition to the foregoing fines and sentences, the defendants were each sentenced in the contempt proceeding to the same terms in the Federal penitentiary and the same fines were imposed as in the heretofore numbered causes, and the sentences and fines on the criminal contempt were suspended conditioned upon the serving of the sentences and payment of the fines, by each defendant, imposed by the court in the other matters (176, 178, 181, 183, 186, 486-487).

The petitioners duly filed a notice of appeal (144, 145).

The transcript of the record, including the statement of points relied upon for reversal, was filed in the court below.

REASONS FOR GRANTING THE WRIT

The opinion of the court below raises important questions of Federal law which have not been but should be determined and settled by this court. The opinion of the Court of Appeals for the Tenth Circuit decided several Federal questions in such a way as to be in conflict with the applicable decisions of this Court, and the decisions of the Courts of Appeal for other circuits, and sanctions such departure by the trial court from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

I.

The court below has determined that the general scheme of the conspiracy was to obtain the release of Eugene Smaldone in the criminal case which was pending against him by bribing and corrupting members of the jury panel, and has held that there was but one conspiracy (502). In the same opinion, however, the court below affirmed the convictions and sentences of the petitioners on both of the conspiracy counts in Indictment No. 13800, which is contrary to the decisions of this Court and the decisions of nearly every circuit.

Braverman v. United States, 317 U.S. 49 (1942); *Frohwerk v. United States*, 249 U.S. 204 (1918); *United States v. Rabinowich*, 238 U. S. 83 (1914); *United States v. Manton*, 107 F. 2d 834 (2d Cir. 1938); *May v. United States*, 175 F. 2d 994 (D. C. Cir. 1949), cert. denied, 338 U.S. 830 (1948); *Troutman v. United States*, 100 F. 2d 628 (10th Cir. 1938).

Indictment No. 13800, in the first count, charged Eugene Smaldone, Clyde George Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone and Michael J. Benallo with a conspiracy to violate 18 U.S.C. 1503, and in the second count charged the same parties with a separate conspiracy to violate 18 U.S.C. 206. The evidence adduced at the trial undisputedly indicates that both counts in Indictment No. 13800 are based on the same transactions or occurrences, and it is fundamental that a single agreement to commit acts in violation of several penal statutes is punishable as one and not as several conspiracies. *Braverman v. United States*, 317 U.S. 49 (1942); *Miller v. United States*, 4 F. 2d 228 (7th Cir. 1925); *Powe v. United States*, 11 F. 2d 598 (5th Cir. 1926) (233).

In upholding the trial, conviction and sentencing of the petitioners on two conspiracies, based on the same transaction, the court below has established a dangerous precedent, and has tacitly ordered the trial court to try the remaining cases which are pending on the same basis. Six conspiracy indictments are still pending in the United States District Court for the District of Colorado, bearing the following captions: The United States of America vs. Eugene Smaldone, aka Checkers Smaldone, William Calvaresi and Jerry Benallo, Jr., Defendants, No. 13775*; The United States of America vs. Eugene Smaldone, also known as Checkers Smaldone, Clyde George Smaldone, also known as "Flip Flop" Smaldone, William Calvaresi, and Jerry Benallo, Jr., Defendants, No. 13779*; The United States of America vs. Eugene Smaldone, also known as Checkers Smaldone, Clyde George Smaldone, also known as "Flip Flop" Smaldone, Fiore Smaldone, and Michael J. Benallo, Defendants, No. 13792*; The United States of America vs. Eugene Smaldone, also known as Checkers Smaldone, Clyde George Smaldone,

* Captions of the above cases taken from the original record certified to this Court, on file in the Clerk's office and appearing in the original record at 63, 70, 191, 195.

also known as "Flip Flop" Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, and Michael J. Benallo, Defendants, No. 13793*; The United States of America vs. Eugene Smaldone, also known as Checkers Smaldone, Clyde George Smaldone, also known as "Flip Flop" Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, and Michael J. Benallo, Defendants, No. 13800; The United States of America vs. Eugene Smaldone, also known as Checkers Smaldone, Clyde George Smaldone, also known as "Flip Flop" Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, Michael J. Benallo and Joseph F. Cefalu, No. 13833. Conspiracy Indictment No. 13775 is identical to Indictment No. 13800 and to all of the other conspiracy indictments, except that each succeeding conspiracy indictment after Indictment No. 13775 includes an additional party or parties, charges a different date for the commencement of the conspiracy, and sets forth an additional overt act or acts to those charged in Indictment No. 13775 (112, 148).

At the time of trial, Fiore Smaldone became ill and the United States Attorney moved that both he and his son be severed for the purpose of the trial of the consolidated cases (196, 230, 486). Both Fiore Smaldone and Louis F. Smaldone are at the present time awaiting trial on all of the conspiracy indictments in which they are named and on substantive indictments as well. Moreover, Joseph F. Cefalu is awaiting trial on conspiracy Indictment No. 13833, to which Eugene Smaldone and Clyde George Smaldone have pleaded guilty. All of the conspiracy indictments attempt to make two conspiracies out of one, which is contrary to the decisions of this Court. The opinion of the court below is directly in conflict with *Braverman v. United States*, 317 U. S. 49 (1942); *Frohwerk v. United States*, 249 U. S. 204 (1918), and *United States v. Rabinowich*, 238 U. S. 83 (1914), and establishes a serious conflict between the circuits which should not be allowed to stand. *United States v. Manton*, 107 F. 2d 834 (2nd Cir. 1938); *May v. United States*, 175 F. 2d 994 (D. C. Cir. 1949); *Troutman v. United States*, 100 F. 2d 628 (10th Cir. 1938).

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* Captions of the above cases taken from the original record certified to this Court, on file in the Clerk's office and appearing in the original record at 63, 70, 191, 195.

II.

The court below has decided another Federal question in such a way as to be in conflict with this Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1945). The court below has held that there was but one conspiracy, but at the same time has affirmed the conviction of both of the petitioners on the two counts of conspiracy in Indictment No. 13800 (502). Conspiracy Indictment No. 13800 named seven defendants, and the undisputed evidence adduced at the trial showed seven separate and distinct jury tampering episodes centering around Eugene Smaldone and Clyde George Smaldone. Evidence was produced which would show three efforts to importune or bribe the June jury and four attempts to bribe or influence the September jury. No evidence was adduced to connect the petitioners with each other or with any other defendant, other than possibly Eugene Smaldone. No evidence connects Jerry Benallo, Jr., with any other defendant, and the evidence connecting William Calvaresi with the Smaldone brothers was presented by Paul E. Bush, of the Federal Bureau of Investigation, who testified as to the oral confession of William Calvaresi after arrest, and which this Court declared to be inadmissible against the other conspirators in *Fiswick v. United States*, 329 U.S. 216 (1947). No evidence was adduced to show that either of the petitioners knew that the common purpose or general scheme of the conspiracy was to procure the release of Eugene Smaldone in the criminal case which was pending against him or to justify such an inference. No evidence indicates that anyone, other than possibly Eugene Smaldone and Clyde Smaldone, knew that the common purpose described by the court below existed. The evidence wholly fails to disclose a connecting link between William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis Smaldone and Michael J. Benallo, or between Eugene Smaldone, Clyde George Smaldone, Jerry Benallo, Jr., or Michael J. Benallo. It is inconceivable that the defendants in forming a conspiracy to influence jurors summoned for a June trial would at the same time have the foresight to conspire that if there was a hung jury, as there was in the trial of Eugene Smaldone, that they would immediately try to influence the jurors that would be called for the retrial of the same case. The continuous cooperation between conspirators which is necessary to the continuing

conspiracy found by the court below is not present. See *Fiswick v. United States, supra.*

Proof of two to seven small conspiracies does not prove the one large conspiracy which was found by the court below. *Kotteokos v. United States, supra.* The evidence undisputedly indicates that the petitioners were concerned only with Effie B. Alsup, and that all of the other defendants had separate, though similar, ends which could be traced to Eugene Smaldone. The record shows the following separate, distinct and unconnected conspiracies:

June jury panel—

1. A conspiracy between W. E. Lawson, Fiore Smaldone and Louis F. Smaldone to bribe Owen E. Spencer, who was a member of the June jury panel (402-418).

2. A conspiracy between Fiore Smaldone, and inferentially, the Smaldones, to influence Caroline A. Baer and cause her to hang the June jury after she had been dismissed from the jury panel (508).

3. A conspiracy between Michael J. Benallo and a person or persons unknown to influence Merle D. Hall, who was a member of the jury selected to try Eugene Smaldone for tax evasion (395-399).

September jury panel—

4. A conspiracy between William Calvaresi and the Smaldones to bribe or attempt to bribe Effie B. Alsup, who was summoned to the September jury panel, by offering her $250.00 (323-332).

5. A conspiracy between Jerry Benallo, Jr., and persons unknown to influence Mrs. Alsup by offering her a nice gift (329-330).

6. A conspiracy between Raymond J. SaBell, Eugene Smaldone and Clyde George Smaldone to bribe Frank P. Rossi who was a member of the September jury panel, by offering him "350" (360-370).

7. A conspiracy between John H. McCusker, Eugene Smaldone and Joseph Cefalu to influence or bribe Elizabeth Buschbach through her father, Anthony E. Buschbach (425-438).

The mere proof of the overt acts charged against the petitioners and the other defendants does not prove the unlawful agreement. *Linde v. United States*, 13 F. 2d 59 (8th Cir. 1926); *Bell v. United States*, 2 F. 2d 543 (8th Cir. 1924). The Government proved the several links of a conspiracy but failed to show the single unifying purpose found by the court below, and, therefore, failed to forge the chain necessary for a single conspiracy. *United States v. Rosenberg*, 195 F. 2d 583, 601 (2nd Cir. 1952); *Marcante v. United States*, 49 F. 2d 156 (10th Cir. 1931).

Petitioners were further prejudiced by the fact that Eugene Smaldone and Clyde George Smaldone entered pleas of guilty to both counts of conspiracy Indictment No. 13833, which the opinion of the court below has held to be identical with the conspiracy indictment upon which the petitioners were convicted (507, 158).

The petitioners contend that their substantial rights were prejudiced when they were indicted, tried, convicted and sentenced on two conspiracies other than the mammoth conspiracy found by the court below, and that the evidence shows seven conspiracies. The petitioners also contend that they were further prejudiced by being tried for substantive offenses with the conspiracy offense and that the opinion of the court below squarely conflicts with this Court's decision in *Kotteokos v. United States*, 238 U. S. 750 (1945), and improperly construes this Court's decision in *Blumenthal v. United States*, 332 U. S. 539 (1947).

III.

In sustaining the validity of the indictments, the court below has cast aside the decisions of this Court defining the minimum requirements of a criminal indictment. *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Hess*, 124 U.S. 483 (1888); *United States v. Simmons*, 96 U.S. 360 (1878); *Pettibone v. United States*, 148 U.S. 197 (1893); *United States v. Carll*, 105 U.S. 611 (1888); *Burton v. United States*, 202 U.S. 344 (1906). The court below has also added to the burden that the indictments must carry by upholding the trial court's denial of the petitioners' motions for bill of particulars, both before trial and after con-

viction (503, 217, 472). *Wongtai v. United States*, 273 U. S. 75 (1926); *United States v. Glasser*, 116 F. 2d 690 (7th Cir. 1940). The opinion of the court below sets forth that no motion to dismiss the indictment was filed, but it is to be noted that the petitioners made a motion to dismiss the indictments for failure to state an offense against the United States before the case was submitted to the jury on October 29, 1953, and renewed their motion to dismiss and motion for a bill of particulars at the time sentence was imposed on November 23, 1953 (446, 472, 498). The court below completely ignored the petitioners' attack upon the substantive indictments and disposed of the petitioners' motion for a bill of particulars as a matter of discretion (498-503). None of the substantive indictments before this Court allege that the petitioners knew that the person they approached was a juror or had any connection with the administration of justice, and this Court has held that a failure to allege scienter makes such an indictment fatally defective (10, 75). *Pettibone v. United States*, 148 U.S. 197 (1893).

Moreover, all of the indictments are silent as to the name of the juror who was bribed or influenced, and the circumstances, manner and place at which the petitioners violated 18 U.S.C. 1503 and 18 U.S.C. 206. Both petitioners directed motions for bill of particulars to the substantive indictments, both before the trial for the purpose of securing information to prepare a defense and prevent surprise at the trial, and after trial for the purpose of protection against subsequent prosecution for the same offense, and the bill of particulars was summarily denied in both instances (217, 472). Furthermore, the opinion of the court below points out that the name of the juror or jurors, or friends of jurors, who were contacted or importuned would be material when the defendants were tried for the substantive offense if not for the conspiracy offense, and then ignores the bill of particulars as purely a matter of discretion and sustains the conviction and sentences of both petitioners on the substantive indictments upon which they were tried and convicted, which is totally inconsistent (600, 503, 514, 497). In effect, the court below sustained the convictions of the petitioners on the substantive indictments and at the same time admitted the defects and insufficiency of the substantive indictments with the following statement:

> "What individual jurors, or how many, or what friends of prospective jurors they (the defendants) undertook to contact would become material only when they went to trial for the substantive offenses" (500).

The petitioners contend that the court below, in sustaining the validity of the indictments and in sustaining the trial court's action in denying their motions for a bill of particulars, has deprived them of their Constitutional right to be informed of the nature and cause of their accusation with such reasonable certainty that a defense could be prepared, surprise avoided, and conviction or acquittal pleaded in bar to a subsequent prosecution for the same offense. U. S. CONST. AMEND. VI. *United States v. Cruikshank*, 92 U. S. 542 (1876). The opinion of the court below in holding that scienter need not be alleged not only deprived the petitioners of the right to have every ingredient of the crime alleged with particularity, but directly conflicts with this Court's decision in *Pettibone v. United States*, 148 U.S. 197 (1893), and the decision of the Seventh Circuit in *Genna v. United States*, 293 Fed. 387 (7th Cir. 1923). Petitioners contend that the substantive indictments fail to charge an offense against the United States and that the court below, in sustaining the indictments, deprived them of due process of law under the Fifth Amendment of the Constitution and established a dangerous precedent which this Court should not allow to stand.

IV.

Another important question of Federal law has been decided by the court below that has not been decided by this Court. The court below has held that every member of the jury panel is a juror within the contemplation of 18 U.S.C. 206 (500). This Court has never construed the Federal bribery statute, 18 U.S.C. 206, and the opinion of the court below conflicts in principle with the opinions rendered by the court of appeals for two other circuits on the statutory construction of the word juror in 18 U.S.C. 206. *United States v. Sager*, 49 F. 2d 725 (2nd Cir. 1931); *Slade v. United States*, 85 F. 2d 786 (10th Cir. 1936); *United States v. Zullo*, 151 F. 2d 560 (3rd Cir. 1945).

The opinion of the court below relies on this Court's

decision in *United States v. Russell*, 255 U.S. 138 (1921), as authority for the proposition that Congress intended the bribery statute to encompass the entire jury panel. This Court construed a predecessor to 18 U.S.C. 1503 in *United States v. Russell, supra*, in such a way as to punish any endeavor to influence, intimidate or impede those connected with the courts and included members of the jury panel, but did not construe 18 U.S.C. 206 or any predecessor bribery section. *United States v. Marsh*, 106 Fed. 474 (5th Cir. 1901), which was cited by the court below as further authority for the broad construction of the word "juror" in 18 U.S.C. 206, deals solely with the rights of a clerk of the court to a fee for administering an oath to a juror, and was preceded by *Marsh v. United States*, 88 Fed. 879 (D. C. Fla. 1898), which defined a juror for the purpose of a clerk's fee as a person who had been impanelled and sworn to serve on a jury.

The petitioners contend that Congress provided for two separate and distinct jury tampering crimes, with graduated fines and graduated imprisonments for the punishment of the crime of the greater magnitude. 18 U.S.C. 1503 extends the power to punish the obstruction of the due administration of justice to more remote situations. 18 U.S.C. 206 encompasses a more restricted class in which both the effect of influence and the penalty must necessarily be great. The penalties for the violation of 18 U.S.C. 1503 and 18 U.S.C. 206 when placed side by side force the conclusion that the opinion of the court below improperly extends this Court's holding in the *Russell* case to include the word "juror" in 18 U.S.C. 206. 18 U.S.C. 1503 provides for the punishment of violators with a maximum fine of $5,000.00 or imprisonment for a maximum period of five years, or both. The bribery section, 18 U.S.C. 206, is far more severe and provides for the punishment of those who would give or offer a bribe to a judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding or controversy, with a fine of $20,000.00 or imprisonment for fifteen years, or both, and disqualifies a violator from holding any office of honor, trust or profit under the United States. The extent of the crime is also indicated by the fact that Congress has placed an attempt

to bribe the persons described in 18 U.S.C. 206 on the same plane with the crime committed by a judge who would lower himself to the level of accepting a bribe, and Congress has provided for equal penalties. 18 U.S.C. 207.

The severity of the punishment, buttressed by the maxim, *ejusdem generis*, demands that the word "juror" as used in the statute be limited to the same class of persons as those specifically enumerated within the statute. All other persons specifically described in the statute are persons who have been duly sworn to hear and determine questions, matters, proceedings and controversies. The fact that the statute in question is a penal statute and must be strictly construed also contradicts the construction placed on the word "juror" by the court below when the broad wording of 18 U.S.C. 1503 is contrasted to the restricted wording of 18 U.S.C. 206. The present statute is an outgrowth of Sec. 237 of Title 18, which provided:

> "Whoever, directly or indirectly, shall give or offer, or cause to be given or offered any money, property, or value of any kind, or any promise or agreement therefor, or any other bribe, to any judge, judicial officer, or other person, authorized by any law of the United States to hear or determine any question, matter, cause, proceedings, or controversy, with intent to influence his action, vote, opinion or decision thereon, or because of any such action, vote, opinion or decision, shall be fined not more than $20,000, or imprisoned not more than fifteen years, or both; and shall forever be disqualified to hold any office of honor, trust, or profit under the United States."

Three circuits have ruled on the construction of 18 U.S.C. 237 which did not specifically enumerate jurors as being within the statute. The Second Circuit, with a fact situation involving the bribery of a juror actually impanelled and sworn, and sitting in the trial of a case, held that a juror was not included within the contemplation of 18 U.S.C. 237. *United States v. Sager*, 49 F. 2d 725 (2nd Cir. 1931). The *Sager* case was followed by *Slade v. United States*, 85 F. 2d 786 (10th Cir. 1936), and *United States v. Zullo*, 151 F. 2d 560 (3rd Cir. 1945), which involved the bribery of jurors sitting in the trial of actual cases, and both cases held that

a juror was a judicial officer within the terms of 18 U.S.C. 237. Thereafter, Congress amended the statute to include the term "juror," and the reviser's note indicates that the revision of the statute occurred to eliminate the uncertainty of the meaning of the term "judicial officer" in 18 U.S.C. 237, and to cause this section to conform with 18 U.S.C. 207 and 18 U.S.C. 208, which are companion sections and deal with the acceptance of a bribe by a judge or judicial officer.

This Court has never construed the word "juror" in 18 U.S.C. 206, and has never construed the Federal bribery statute. The petitioners were convicted and sentenced for violating both 18 U.S.C. 1503 and 18 U.S.C. 206 for the same act or acts of attempted bribery of a member of the jury panel, and contend that the opinion of the court below in construing the word "juror" in 18 U.S.C. 206 conflicts in principle with *Slade v. United States, supra; United States v. Zullo, supra,* and *United States v. Sager, supra,* and improperly interprets and extends this Court's decision in *United States v. Russell, supra.* The proper construction of the word "juror" in 18 U.S.C. 206 presents an important question of Federal law to this Court, which has not been, but should be, settled by this Court.

V.

Another important and substantial question of Federal law is placed in issue by the opinion of the court below that has not been, but should be, settled by this Court. It is whether a reviewing court should examine the record to determine whether there was prejudice manifested toward a defendant in the trial of a case, by erroneous ruling of the trial judge and by his manner and demeanor, after he has overruled an affidavit and motion for his disqualification, filed by the same defendant, on the ground that the affidavit was not legally sufficient. The opinion of the court below answered this question by pointing out that many of the events complained of by the petitioners as indicating bias and prejudice on the part of the trial judge occurred after the beginning of the trial, and could not have formed the basis of an affidavit of bias and prejudice before the trial, and were largely matters lying within the trial judge's discretion (504). The reasoning of the court below in sustain-

ing the trial judge's action in refusing to disqualify himself is based on the false premise that a defendant can anticipate the full scope of a judge's prejudice at the time he files his affidavit and motion for disqualification, and conflicts with *Whittaker v. McLean*, 118 F. 2d 596 (D. C. Cir. 1941), and *United States v. Buck*, 23 F. Supp. 503 (D.C.W.D. Mo. 1938). It is too plain for cavil, that an affidavit and motion for disqualification must be filed in a timely manner, and in this case, by the court's ruling, had to be filed within ten days after September 23, 1953 (13). 28 U.S.C. 144. At the time the petitioners filed their affidavits and motions for disqualification, the only facts upon which they could base an affidavit and motion for disqualification were predicated on the excessive bail required by the trial judge and his colloquy with counsel at the bond hearings. Therefore, the transcript of the record from the bond hearings was attached to the affidavit and motion for disqualification and filed within the ten days allotted to the petitioners (18).

Thereafter, the trial judge manifested overwhelming bias and prejudice toward both petitioners and toward every defendant in the consolidated cases. The trial judge originally set bail for Jerry Benallo, Jr., at $700,000.00 and at an equally fantastic amount for William Calvaresi (77, 13). Later, after motions for reduction of bail had been filed, he reduced the bail of both petitioners to $400,000.00, and reasonable bail was only made by appealing his decision to the United States Court of Appeals for the Tenth Circuit (18, 79, 121, 76). *William Calvaresi v. United States*, 207 F. 2d 776 (10th Cir. October 21, 1953); *Jerry Benallo, Jr. v. United States*, 207 F. 2d 776 (10th Cir. October 21, 1953). At the bond hearing, the trial judge said:

> "Well, I will tell you, counsel, treason and murder cases in my view are no worse than an attempt to bribe a juror in a court of justice" (21).

The petitioners contend that the remarks of the trial judge equating an attempt to bribe a juror to murder and treason are comparable to those that formed the basis of an affidavit and motion for disqualification of Judge Carter of the Southern District of California in a Smith Act case, when he set bond at $75,000.00 and said:

> "I am sorry to see you getting mixed up with these Commies, Dan. They're just trying to use you . . . We must have another long talk." *Connelly v. United States*, 191 F. 2d 692 (9th Cir. 1951).

The Court of Appeals for the Ninth Circuit found the affidavit supporting a motion for disqualification, and based upon Judge Carter's colloquy with counsel, to be legally sufficient.

Prejudice in the instant case is indicated by the trial judge's action in setting bail in astronomical amounts, examining the grand jury minutes prior to the trial, abusing the contempt power and imposing sentences without granting any defendant an opportunity to present matters in mitigation (12, 13, 77, 38-42, 471, 480-487). The mass sentencing of all defendants for contempt of court in which the trial judge imposed the same fines and the same terms in the Federal penitentiary as on the other indictments, suspending the fines on the condition that the fines be paid on the other indictments and the sentences on the condition that the sentences be served on the other indictments, is foreign to any system of jurisprudence (487). Appendix F contains a summary of the acts of the trial judge which would tend to show bias and prejudice toward the petitioners.

The Court of Appeals for the Tenth Circuit found the trial judge guilty of an abuse of discretion in forfeiting a $10,000.00 appearance bond of Eugene Smaldone during the first tax evasion trial when he was taken to the hospital for an emergency operation. *Smaldone v. United States*, 211 F. 2d 161 (10th Cir. 1954). The petitioners contend that the abuse of discretion found by the court below in *Smaldone v. United States, supra,* can be equated to bias and prejudice and that the trial judge manifested bias and prejudice during the entire trial, not only toward the Smaldones but toward all other defendants on trial as well.

If a trial judge can cast any affidavit and motion for disqualification aside on the ground that the affidavit is not legally sufficient, then the purpose of the Federal Recusation Statute has been frustrated. *Berger v. United States*, 255 U.S. 22 (1921). The acts of a trial judge after a trial is commenced are far more to be feared than his acts prior

to trial. Petitioners contend that the record bears out the fact that the court below has tolerated such abuse of discretion by the trial judge as to call for an exercise of this Court's supervisory powers. The petitioners, by the trial court's action, were deprived of a fair trial under the Sixth Amendment, due process of law under the Fifth Amendment, and were jailed in violation of the Eighth Amendment of the Constitution for failure to make excessive bail.

VI.

The opinion of the court below conflicts with the opinion of this Court in *Shepherd v. Florida*, 341 U. S. 50 (1951). The petitioners and all other defendants in the consolidated cases filed a motion for transfer to another district, supported by Exhibit A, which contained a small amount of the adverse newspaper publicity surrounding the case (52, 54). Exhibit A has been certified to this Court and is on file with the Clerk of this Court. A cursory examination of Exhibit A will indicate the flamboyant front-page headlines that followed the case from the first indictment to the filing of the motion for transfer to another district. The so-called "Smaldone case" drew an unprecedented and unequalled amount of hostile publicity from the newspapers, radio and television in the Denver area, and throughout the entire State of Colorado.

Prior to trial, petitioners not only filed a motion for transfer to another district, but also requested a continuance, and both were summarily denied (209, 229, 242). The order denying a continuance and overruling the motion for transfer to another district was aggravated by the fact that the petitioners were advised on October 22, 1953, that the United States Attorney would join Indictments No. 13777, 13778, 13794, 13795, 13796, 13797, 13801 and 13802 with Indictment No. 13800 for trial (69, 82, 93, 106, 132), and were advised on the same day that the United States Attorney would sever Eugene Smaldone and Clyde George Smaldone from conspiracy Indictment No. 13800 for the purpose of trial because they previously pleaded guilty to a similar conspiracy indictment in Cause No. 13833 (133).

On the following day, the United States Attorney saw fit to file another motion to consolidate, wherein he asked that Indictment No. 13794, 13795 and 13800 be joined for trial (96,

106, 133), and, thereafter, with the permission of the court, withdrew all motions on October 26, 1953, and made an oral motion to consolidate Nos. 13777, 13778, 13794, 13795, and 13800, for trial, and the motion was granted (229, 230, 238, 70, 82, 96, 107, 135). The petitioners contend that after publicized motions to consolidate were made as often as they were, and immediately prior to trial, that they were prejudiced and denied a fair trial.

The trial judge even added to the publicity in the case with his blanket minute order of September 21, 1953, in the cases numbered and entitled, 13775—United States vs. Eugene Smaldone, also known as Checkers Smaldone, William Calvaresi and Jerry Benallo, Jr.; 13776—United States vs. Eugene Smaldone, aka Checkers Smaldone; 13777—United States vs. William Calvaresi; 13778—United States vs. Jerry Benallo, Jr.; increasing the $50,000.00 bond that he set earlier that day to $100,000.00 *sua sponte*, and directing that the information be given to the press (12-13).

Petitioners also made a motion for relief from prejudicial joinder, which the trial judge cast aside even though both Eugene Smaldone and Clyde George Smaldone entered pleas of guilty to the mammoth conspiracy indictment known as 13833, which the court below has held to be identical with conspiracy Indictment No. 13800 upon which all defendants were tried (162, 222, 507).

Bias and prejudice toward the petitioners and all those on trial was indicated by the fact that twenty-two jurors admitted actual bias and prejudice when examined by the court on the *voir dire* (242, 321). Both of the petitioners were forced to trial, over their objection, with the notorious Smaldones after the trial judge took the pleas of *autrefois convict* entered by the Smaldone brothers under advisement and consolidated conspiracy Indictment No. 13800 with substantive indictments against Eugene Smaldone and Clyde George Smaldone for the purpose of trial (235, 240).

The expressions of bias and prejudice of the twenty-two jurors were but confirmatory of the allegations in the motions for change of venue, namely, that the persistent, widespread and vitriolic campaign against the Smaldones and the petitioners had the effect of poisoning the public mind. The bias

and prejudice existing in the jury box and dominating the trial was indicated by the fact that the jury returned verdicts of guilty against every defendant on trial on every crime charged, and the opinion of the court below found that there was not on scintilla of evidence to sustain the conviction of Michael J. Benallo (513), or evidence to sustain the conviction of Eugene Smaldone on eight counts of the substantive indictment on which he was convicted (508-512), but did not find it to be error for the trial judge to refuse continuance until the publicity surrounding the trial could subside (242, 229). The trial of the defendants was but a legal gesture to register a verdict already dictated by the press and public opinion. The petitioners contend that the trial which they endured is identical to the trial that this Court condemned in *Shepherd v. Florida*, 341 U. S. 50 (1951), and the trial that the First Circuit condemned in *Delaney v. United States*, 199 F. 2d 107 (1952).

The court below treats the motions for transfer to another district, filed by the defendants under Rule 21 (a) of the Federal Rules of Criminal Procedure as wholly a matter of the trial judge's discretion, and thereby sanctions such a departure from the normal course of judicial proceedings by the trial judge as to call for this Court's power of supervision (503). If the publicity and notoriety surrounding the Smaldone case did not require a transfer to another district, then the reason for Rule 21 (a), F. Crim. P., has ceased to exist. This Court, in a chain of decisions, has prohibited a trial judge from interfering with the newspapers and the publicity incident to a trial. *Shepherd v. Florida*, 341 U. S. 50 (1951), *Pennekamp v. Florida*, 328 U. S. 331 (1946), *Craig v. Harney*, 331 U. S. 367 (1947). If publicity cannot be stopped, a fair trial can only be secured by transferring a case for trial to a district where less hostile and vicious forces are at hand, or by granting a continuance until the publicity subsides. Trial by newspaper is not a fair trial under the Sixth Amendment to the Constitution.

VII.

This joint petition for writ of certiorari has many points in common with the joint petition for writ of certiorari filed on behalf of Eugene Smaldone and Clyde George Smaldone.

Therefore, the petitioners respectfully urge that the reasons set forth in the joint petition for a writ of certiorari filed on behalf of Eugene Smaldone and Clyde George Smaldone pertaining to the proper construction of the word juror as set forth in 18 U.S.C. 206 apply also to this petition. The reasons presented in the joint petition of Eugene Smaldone and Clyde George Smaldone relating to a fair and impartial trial of the consolidated cases, disqualification of the trial judge, motions for transfer to another district, motions for a bill of particulars, and to the issue of the Government's failure to properly charge and prove a conspiracy against the laws of the United States, or any other offense, apply with equal force to this petition, and are, therefore, incorporated by reference.

The petitioners believe that the questions presented in the joint petition for a writ of certiorari of Eugene Smaldone and Clyde George Smaldone also apply to this petition and present important questions of Federal law which have not been, but which should be, settled by this Court.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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W. H. Erickson,
Albert E. Sherlock,
Milton Berger,
Counsel for Petitioners.

January, 1955.

FILED
JAN 13 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 538

WILLIAM CALVARESI AND JERRY BENALLO, JR., *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No.

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

Nos. 4833, 4834, 4835, 4836, 4837, 4838, 4839, 4840, 4841, 4842, 4843, 4844, 4845, 4846, 4847, 4848—
SEPTEMBER TERM, 1954.

William Calvaresi, Appellant,
4833 vs.
United States of America, Appellee.

Jerry Benallo, Jr., Appellant,
4834 vs.
United States of America, Appellee.

Eugene Smaldone, Appellant,
4835 vs.
United States of America, Appellee.

Clyde Smaldone, Appellant,
4836 vs.
United States of America, Appellee.

William Calvaresi, Appellant,
4837 vs.
United States of America, Appellee.

Jerry Benallo, Jr., Appellant,
4838 vs.
United States of America, Appellee.

Eugene Smaldone, Appellant,
4839 vs.
United States of America, Appellee.

Clyde Smaldone, Appellant,
4840 vs.
United States of America, Appellee.

Michael J. Benallo, Appellant,
4841 vs.
United States of America, Appellee.

} Appeals from the United States District Court for the District of Colorado.

Eugene Smaldone, Appellant,
4842 vs.
United States of America, Appellee.

Clyde Smaldone, Appellant,
4843 vs.
United States of America, Appellee.

William Calvaresi, Appellant,
4844 vs.
United States of America, Appellee.

Jerry Benallo, Jr., Appellant,
4845 vs.
United States of America, Appellee.

Eugene Smaldone, Appellant,
4846 vs.
United States of America, Appellee.

Clyde Smaldone, Appellant,
4847 vs.
United States of America, Appellee.

Michael J. Benallo, Appellant,
4848 vs.
United States of America, Appellee.

[November 2, 1954.]

A. F. Zarlengo, W. H. Erickson and Francis S. Mancini (A. X. Erickson, Albert E. Sherlock, Milton Berger, F. E. Dickerson, T. J. Morrissey, W. F. Dwyer and William L. Rice were with them on the brief) for Appellants.

Donald E. Kelley, United States Attorney, and James W. Heyer, Assistant United States Attorney (Robert Swanson, Assistant United States Attorney was with them on the brief) for Appellee.

Before Huxman, Murrah and Pickett, United States Circuit Judges.

Huxman, Circuit Judge.

These appeals center around a series of indictments returned against appellants in the United States District

Court for the District of Colorado. Indictments Numbers 13,800 and 13,833 were conspiracy indictments, in which all of the appellants together with others were joined. Numbers 13,777, 13,778, 13,794 and 13,795 were indictments against individual defendants, charging them with the commission of substantive offenses growing out of the conspiracy indictments. All of the indictments except Number 13,833 were consolidated for trial. No trial other than as to Eugene Smaldone and Clyde George Smaldone has been had on that indictment. For the purpose of simplifying the record and saving unnecessary expense of duplicate records in each appeal, a consolidated record and brief were filed by the appellants. All appellants join in presenting the issues common to all of them and in urging additional assignments arising in each individual case under the substantive indictments. All the parties to this appeal are to be commended for this because such a procedure has not only resulted in eliminating a great deal of unnecessary court costs and printing fees but has greatly lightened our work in considering the issues presented.

On September 21, 1953, indictment Number 13,777 containing four counts was returned against William Calvaresi. Counts one and two charged him with corruptly endeavoring to influence and impede petit jurors in the United States District Court for Colorado and by such means endeavoring to impede the administration of justice in a trial set for September 21, 1953, against Eugene Smaldone, in violation of 18 U.S.C.A. § 1503. Counts three and four predicated on the same acts charged in counts one and two charged him with bribing and offering to bribe such jurors, in violation of 18 U.S.C.A. § 206.

On the same day, indictment Number 13,778 containing two counts was returned against Jerry Benallo, Jr. Count one charged him with unlawfully endeavoring to impede the administration of justice in the same trial by seeking to intimidate jurors by threats and force, in violation of 18 U.S.C.A. § 1503. Count two predicated on the same trans-

action set out in count one charged the offense of bribery and attempted bribery, in violation of 18 U.S.C.A. § 206.

On September 25, 1953, indictment Number 13,794 was returned against Eugene Smaldone. The first eight counts charged that on the dates specified therein the defendant by force and threats endeavored to influence petit jurors in the case pending against Eugene Smaldone and thus sought to obstruct the administration of justice, in violation of 18 U.S.C.A. § 1503. Counts nine to sixteen, inclusive, based upon the same transactions set out in the first eight counts charged bribery and attempted bribery of jurors, in violation of 18 U.S.C.A. § 206.

On September 25, 1953, indictment Number 13,795 was returned against Clyde George Smaldone. The first three counts charged that on dates specified therein the defendant by force and threats endeavored to influence petit jurors in the case against Eugene Smaldone and thus sought to obstruct the administration of justice. Counts four, five and six based upon the same transactions set out in the first three counts charged bribery and attempted bribery of jurors, in violation of 18 U.S.C.A. § 206.

On September 28, 1953, indictment Number 13,800 in two counts was returned against Eugene Smaldone, Clyde George Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone and Michael J. Benallo. Count one charged them with a conspiracy under 18 U.S.C.A. § 371 to commit an offense against the United States, in that they would corruptly and by threats and force and by threatening communications endeavor to influence jurors summoned on a panel to the United States District Court in a case pending against Eugene Smaldone. This count set out twenty overt acts. Count two charged a conspiracy under 18 U.S.C.A. § 371 to bribe and offer bribes to such jurors.

On October 16, 1953, indictment Number 13,833 in two counts was returned against the same defendants and one additional defendant, Joseph F. Cefalu. The two counts of this indictment were identical in substance with the corre-

sponding two counts of indictment Number 13,800. The indictment set out the same twenty overt acts set out in Number 13,800, but contained two additional overt acts.

Before trial, Eugene Smaldone and Clyde George Smaldone entered pleas of guilty to counts one and two of indictment Number 13,833. The remaining defendants pleaded not guilty thereto and all defendants pleaded not guilty to all other indictments, including conspiracy indictment Number 13,800. Louis F. Smaldone and Fiore Smaldone were granted a severance and have not been brought to trial.

When the consolidated indictments came on for trial, Eugene Smaldone and Clyde George Smaldone filed pleas of former jeopardy in causes Numbers 13,794, 13,795 and 13,800, predicated on the ground that these indictments charged the same offense to which they had pleaded guilty under indictment Number 13,833. The trial court reserved its ruling on the motion until after the verdict by the jury and thereafter overruled the motion. The jury found all defendants guilty on all counts of all indictments on which they were tried in the consolidated case.

Sentences.

In Number 13,777 the court sentenced William Calvaresi to five years on counts one and two and to fifteen years on counts three and four. Two years of the sentence on counts one and two and ten and one-half years of the sentence on counts three and four were suspended. A fine of $5,000 was also imposed. The sentences on all four counts were made to run consecutively. In Number 13,800 Calvaresi was sentenced to a term of five years on each of counts one and two. The judgment is silent as to whether these sentences run consecutively or concurrently. Service of sentence was suspended. Calvaresi thus is required to serve a total sentence of fifteen years and pay a fine of $5,000.

In Number 13,794 Eugene Smaldone was sentenced to five years on each of the first eight counts and to fifteen years on each of counts nine to sixteen, inclusive, and to pay a

fine of $24,000. Two years of the sentence on each of the first eight counts were suspended; twelve years of the sentence on counts nine to fourteen, inclusive, were suspended and eleven years of the sentence on each of counts fifteen and sixteen were suspended. In Number 13,833 he received consecutive sentences of five years each on counts one and two, these sentences to run consecutively to the sentences imposed in Number 13,794. In Number 13,800 he received consecutive sentences of five years on each of counts one and two, these sentences to run concurrently to those imposed in Numbers 13,794 and 13,833. Service of this sentence was suspended. The total sentence he was required to serve was sixty years.

In Number 13,795 Clyde Smaldone was sentenced to five years on each of counts one, two and five and to fifteen years on each of counts three, four and six, and to pay a fine of $24,000. One year of the sentence on counts one, two and five, two years of the sentence on each of counts four and six, and three years of the sentence on count three were suspended. In Number 13,833 he received consecutive sentences of five years on each of counts one and two. These sentences were made to run consecutively to the sentences imposed in Number 13,795. In Number 13,800 he received consecutive sentences of five years on each of counts one and two. Service of Sentence was suspended. His total sentence was sixty years.

In Number 13,778 Jerry Benallo, Jr., was sentenced to five years on count one and to fifteen years on count two, and to pay a fine of $5,000. Two years of the sentence on count one and three years of the sentence on count two were suspended. In Number 13,800 he received consecutive sentences of five years on each of counts one and two. Service of these sentences was suspended. He was thus required to serve a total of fifteen years.

In Number 13,800 Michael Benallo was sentenced to consecutive sentences of five years on each of counts one and two, making a total term of ten years to be served by him, and to pay a fine of $5,000.

Twenty-one assignments of error are urged for reversal. Those that relate to all the appellants will be treated generally without referring to individual appellants. A number of assignments relate to matters that fall within the field of exercise of discretion by the trial court. In order to keep the opinion within reasonable limits, these assignments will be considered together and we will not set out in detail the evidence in the record which leads us to the conclusions with respect to the same, as hereinafter set out. We think it is sufficient to say that we have given careful and painstaking consideration to these assignments and have considered the entire record and are of the view that the record supports our conclusions.

While appellants state in general that the indictments failed to state an offense against the United States, the arguments on this assignment in the brief are limited to conspiracy indictment Number 13,800 and this assignment will therefore be treated as limited to that indictment. The argument is that the indictment fails to set out the essential elements necessary to constitute the offense of conspiracy and that its allegations are so general that a conviction thereunder would be no protection against being put in jeopardy for the same offense a second time. It is to be noted that no motion to dismiss the indictment was filed. While this does not prevent appellants from for the first time presenting this question on appeal if the indictment in fact is void upon its face, it does require that all reasonable inferences and intendments from the language used shall be drawn in favor of the validity of the indictment.[1]

The primary complaint is that the indictment refers to petit jurors only in general; that it fails to show how many petit jurors were summoned on the panels and that it left to pure guess work what petit jurors were involved, as well as what friends of said jurors had been contacted. This argument overlooks the essence of the offense of conspiracy. The

[1] Elder v. United States, 142 F. (2d) 199; Muench v. United States, 96 F. (2d) 332; Kane v. United States, 120 F. (2d) 990.

gist of the offense charged is the unlawful agreement and understanding between the defendants that they would tamper with members of the panel of jurors. How many or which jurors were to be contacted was not a part of the offense of conspiracy. It was necessary for the Government to allege only that such an agreement was made and that an overt act occurred.

Count one of the indictment charged that the appellants "conspired, combined, confederated and agreed together to commit an offense against the United States; that they agreed that they would then and there corruptly and by threats and force, and by threatening communications, endeaver to influence, intimidate and impede various petit jurors summoned on panels of the United States District Court in and for the District of Colorado, in the case of the United States versus Eugene Smaldone, also known as Checkers Smaldone, set for trial on the 2nd day of June, 1953, and for retrial on the 21st day of September; and that they would endeavor to influence, obstruct and impede the due administration of justice in violation of Title 18 U.S.C. Section 1503." Count two charged in identical language that they conspired to bribe various jurors of the identical panel called in the identical case set for trial and retrial on the identical dates set out in count one, in violation of 18 U.S.C.A. § 206. There is thus no uncertainty with what they were charged. They were charged with conspiring to tamper with a particular jury, particularly described, and to be used in a particular case, the name of which was given and the date on which the case was to be tried was set out in the indictment. As stated, how many jurors they actually contacted or how many friends of jurors they sought to influence was not an element of this charge. All the Government had to prove was the unlawful agreement to tamper with this specific jury in the manner specifically set out therein, for the purpose of violating the two criminal statutes involved. There certainly was no uncertainty as to what jury panel was involved, nor was there a failure to allege overt acts carried out in effecting the conspiracy. What individ-

ual jurors, or how many, or what friends of prospective jurors they undertook to contact would become material only when they went to trial for the substantive offenses.

The further contention is made that the indictment failed to charge an offense under 18 U.S.C.A. § 206, because the prohibition of bribes of "juror • • • authorized by any law of the United States, etc." was not intended to include prospective jurors or jurors summoned on panels but was limited to jurors selected and sworn to try the case set out in the indictment. With this narrow construction of the term "juror" we cannot agree. There are some state decisions that so construe the term "juror". See State v. Williford (Mo.), 86 S.W. 570. However, even in the state courts the majority rule, and what we think is the better rule, is not so narrowly limited. In State v. McCrystol (La.), 9 S. 922, a criminal case, appellant's construction of a "juror" was rejected. Mr. Justice Fenner in part stated, "But all the statutes of the state and all law-writers universally apply the term 'juror' to persons selected and summoned according to law for the purpose of serving as grand or petit jurors, *whether they have been actually impaneled and sworn or not.*"[2] This definition was adopted by the Federal Court in United States v. Marsh, 106 F. 474; and in United States v. Russell, 255 U. S. 138, the Supreme Court held that a member of a jury panel who had not yet been selected or sworn was a juror within the purview of Section 135 of the Criminal Code. It is difficult to believe that Congress in the passage of this Act intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case.

It is further contended that the indictments were insufficient in that they "failed to allege scienter or that the defendants knew that any of the persons set forth in said

[2] Emphasis supplied.

indictments as jurors, or friends of jurors, were in fact jurors or friends of jurors." Scienter or knowledge is an essential element of the conspiracy charged in Number 13,800. Where a personal knowledge is essential to the commission of an offense, it must be averred that the accused had such knowledge and failure to so allege will void the indictment, unless the statement of the act itself necessarily implies a knowledge of its unlawfulness.[3]

Indictment Number 13,800 charged appellants with conspiring to bribe and attempting to bribe various petit jurors summoned on panels of the United States District Court for the District of Colorado, in the case of the United States versus Eugene Smaldone. Thus the panel of jurors to be approached is specifically set out and identified in the indictment. The language of the indictment that they agreed that they would then and there corruptly endeavor to bribe jurors on panels called to try the Smaldone case pinpointed the particular jury referred to and implied knowledge on appellants' part that the persons to be contacted were members of the panel. Since the gist of the offense was to corrupt members of the panel without having in mind at the time any specific juror, there was no need in the conspiracy indictment to allege knowledge that any specific individual was to be approached or was a member of the panel.

What has been said with respect to the definition of what constitutes a juror within the meaning of Title 18 U.S.C.A. Sections 206 and 1503, disposes of assignment of error number three, in which it is urged that the court erred in failing to submit appellants' instruction defining a juror as one who has been sworn to try and determine the case in issue, and assignment of error number four, in which it is urged that the court erred in refusing to direct a verdict of acquittal as to all charges relating to bribery of any of "said so-called jurors" because of lack of proof that they had been selected to sit on the Smaldone jury.

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[3] 42 C.J.S. page 1024; Creswell v. State, 30 S.W. (2d) 247; Bosco v. State, 146 Atl. 238; Pettibone v. United States, 148 U. S. 197; Wharton C.R. & P.R., Section 164.

It is further urged that the indictment in Number 13,800, while purportedly charging only one conspiracy, in fact charged two or more distinct conspiracies. It is urged that the proof showed one conspiracy to bribe jurors in the June trial of Eugene Smaldone, which ended in a mistrial, and another conspiracy to bribe and influence them in the retrial of the case set for September 21, 1953. With this construction we cannot agree. The general scheme was to procure the release of Eugene Smaldone in the criminal case which was pending against him by bribing and corrupting members of the panel from which the specific jurors selected to try the case were to be selected. The mere fact that the first trial ended in a mistrial did not bring to an end the over-all conspiracy and make necessary a second and independent meeting of the minds of the conspirators to effect the release of Eugene Smaldone. It was the intent and purpose of the original conspiracy to do what was necessary in the minds of the conspirators to effect such release in the case pending against Smaldone. When the first trial ended in a mistrial, the original unlawful agreement was continued to bring about the object of that conspiracy. We think the facts of this case bring it within the case of Blumenthal v. United States, 332 U. S. 539, rather than the case of Kotteakos v. United States, 328 U. S. 750, upon which appellants rely.

It is urged that the court abused its discretion in overruling appellants' motion for a bill of particulars, using indictment Number 13,794 as an illustration, in which appellants sought the name of the juror mentioned in each count, his residence, the manner and method alleged to have been used to influence, etc., such juror, and if a threatening communication was delivered to said juror, its contents; in refusing to grant a motion to transfer the case to another district for trial; in refusing to grant the motion of William Calvaresi, Jerry Benallo, Jr., and Michael J. Benallo for relief from prejudicial joinder for trial and in refusing to make the Government reveal the names of its witnesses.

Appellants concede that all the matters complained of in

this group of assignments of error involve the exercise of discretion by the trial court and that they may be heard to complain only where there is an abuse of such discretion. Since there is no dispute as to these principles of law, no authorities need be cited in support thereof. It is also without dispute in the law that an appellate court will not reverse a trial court merely because as triers of the fact it might have acted otherwise in respect to the matters complained of. It will interfere only when it clearly appears from a consideration of the entire record that there has been an abuse of discretion.

Again, what would it avail if we meticulously and in detail set out the portions of the record which impel us to the conclusion that we feel that the record does not support these assignments of error? It is sufficient therefore to say we have given careful consideration to each and every one of these assignments and have carefully examined the entire record and from such examination thereof cannot say as a matter of law that it clearly appears that the trial court's exercise of discretion was arbitrary.

All the appellants filed an affidavit of bias and prejudice and asked the trial judge to disqualify himself. Complaint is made of an order denying the motion and refusing to step aside. When such an affidavit is filed pursuant to 28 U.S.C.A. § 144, stating facts which taken at their face value show bias and prejudice, it is the duty of the judge at once to step aside. All he may do is to examine the affidavit as to its legal sufficiency to comply with the statute on the basis of the facts therein stated. In doing this, he may not give consideration to the truth or falsity of the facts stated therein.[4] The affidavit must state facts and not mere conclusions. The affidavit in this case quoted at great length from colloquy between the court and counsel during various stages of the proceedings. While this colloquy shows that the proceedings were acrimonious at times and evidenced

[4] Scott v. Beams (10th Cir.), 122 F. (2d) 777; Inland Freight Lines v. United States (10th Cir.), 202 F. (2d) 169.

the existence of some feeling between the court and counsel, we do not think it is of such a nature as to show upon its face bias and prejudice. Reliance is also placed upon the excessive bond required in some instances; that all of appellants' motions were overruled; that the motions for judgment of acquittal and to dismiss were overruled without opportunity of argument and that the sentences were so excessive as to indicate personal bias and prejudice. Many of these events occurred after the beginning of the trial and could not have formed the basis of an affidavit of bias and prejudice before the beginning of the trial, but in any event and, without entering into a detailed discussion of each matter complained of, we think they relate largely to the exercise of discretion by the court and in themselves alone are not sufficient to show bias and prejudice. While the sentences imposed are very severe, they are in every instance within the legal maximum provided by statute. It cannot be said that standing alone the imposition of a sentence which the court had lawful authority to impose shows bias and prejudice.

It is further urged that the jury was not fair and impartial and that the verdicts were the result of bias and prejudice. There is no affirmative evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror. In support of the charge it is urged that the evidence could not support more than three counts on the substantive offenses against Eugene Smaldone, no more than one count on the substantive offenses against Clyde Smaldone, and no evidence sustaining the conviction against Michael J. Benallo, but that notwithstanding the jury returned a verdict of guilty on all counts against these defendants. This is urged as proof of bias and prejudice. We agree, as will be pointed out hereinafter, that there was no evidence to support a conviction on some of the substantive counts against Eugene Smaldone and no evidence to support the conviction of Michael J. Benallo. But that is not sufficient in itself to convict a jury of bias and prejudice.

That merely shows that the jury erred in some of its conclusions. Standing alone it is not sufficient to show that its action was the result of bias and prejudice.

Appellants contend that the trial court committed reversible error in not affording them an opportunity to make a statement and to present information, if any, in *mitigation* of punishment before imposition of sentence. Rule 32 (a) of the Federal Rules of Criminal Procedure provides for an opportunity for a defendant to make a statement in his behalf before imposition of sentence. We think that the spirit of this rule should be observed and that before the imposition of sentence a defendant should be asked if he has anything to say before sentence is imposed. It does not, however, follow in all cases that a failure by the court to ask defendant if he has any statement to make results in a violation of the rule or denial of due process. It may appear from the record that defendant did not desire to make a statement. In such case, failure by the court to affimatively ask whether he desired such opportunity would not constitute a violation of the rule. The judgment and commitment in each of these cases is on a printed form which contains a statement that the court asked defendants if they had anything to say before sentence was imposed. It is, however, urged that no such statement was in fact made by the court. An examination of the record contains no statement by the court at the time of sentence, asking defendants if they desire to make a statement, or any evidence from which it could be inferred that the court took such action. Neither, however, does the record contain anything tending to show that appellants asked or indicated that they desired to make a statement either in person or through competent attorneys representing them, who were then present in court. In the absence of such a request by competent counsel representing them at the time, we cannot say that they were not afforded an opportunity to be heard before sentence was imposed, had they desired such a hearing.[5]

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[5] See Shockley v. United States, 166 F. (2d) 704; Savage v. Dist. of Columbia, 54 Atl. (2d) 562.

Appellants also urge that Judge Ritter, who tried this case, was without power to impose sentence upon Eugene Smaldone and Clyde George Smaldone in Number 13,833, in which they entered their pleas of guilty before another district judge because, as is claimed, there is no showing that Judge Knous, who took the plea, was absent from the district or unable for any of the reasons set out in Rule 25, Federal Rules of Criminal Procedure, from imposing sentence. We think that what we said in Owens v. Hunter, 169 F. (2d) 971, is dispositive of this contention. There we said, "And while ordinarily sentence should be imposed by the judge before whom the conviction was had, where there are two judges of the same court with concurrent jurisdiction. a judgment is not void merely because the trial was before one of the judges and the sentence was imposed by the other." The sentences herein challenged were entered upon pleas of guilty and without the taking of evidence or hearing of witnesses. Under these circumstances it was not error for the trial judge to impose sentence, although the plea was taken before another judge.

Eugene Smaldone and Clyde George Smaldone urge that the court erred in refusing to sustain their plea of former jeopardy entered in causes Numbers 13,794, 13,795 and 13,800. Their position is that bringing them to trial on these indictments after they had pleaded guilty to conspiracy indictment Number 13,833 constituted double jeopardy.

The Government with commendable candor concedes that indictment Number 13,833 and indictment Number 13,800 charged the same conspiracy. It follows without more therefore that after they had entered their pleas of guilty to both counts of indictment Number 13,833 bringing them to trial on the two counts of indictment Number 13,800 constituted double jeopardy. The Government in its argument before our court in effect conceded that the sentences imposed on the two counts of indictment Number 13,800 are double sentences for the same offense, but seeks to avoid the effect thereof by stating that the Smaldones may not complain because no additional sentences were imposed in

Number 13,800, in that the sentences therein were made to run concurrently to those imposed in Number 13,833 and also because service of sentence was suspended. But those judgments nonetheless constitute additional sentence. The constitutional inhibition of the Fifth Amendment is not against the imposition of a double sentence for the same offense, but is against trying one for the second time for the same offense.[6] The Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." That in plain language means that one may not be tried a second time for the same offense and that was done with respect to indictment Number 13,800 over the protest and objection of these two appellants. It was not error, however, to overrule the pleas with respect to indictments Number 13,794 and Number 13,795. In those two indictments these two appellants were charged with substantive offenses committed as a result of the conspiracy. These offenses were not identical with those charged in Number 13,833, to which they had pleaded guilty.[7]

Indictment Number 13,794.

Appellant, Eugene Smaldone, was convicted on all sixteen counts of indictment Number 13,794, charging him with the commission of substantive offenses, and received consecutive sentences on each count thereof. He urges that the evidence at most will support conviction and sentencing on not more than four counts. This assignment makes necessary a critical analysis of all the evidence offered in support of these sixteen counts.

Count one charged him with endeavoring to corrupt a juror and thus impeding the administration of justice, in

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[6] Ex Parte Lange, 18 Wall. (U. S.), 163, 21 L. Ed. 872; Hunter v. Wade, 169 F. (2d) 973; United States v. Lewis, 114 F. Supp. 512.

[7] Pinkerton v. United States, 328 U. S. 640; United States v. Rabinowich, 238 U. S. 78; Doherty v. United States (10th Cir.), 193 F. (2d) 487; Upshaw v. United States (10th Cir.), 157 F. (2d) 716; Robinson v. United States (10th Cir.), 143 F. (2d) 276.

violation of Section 1503, on or about June 5, 1953. Count nine, based upon the same transaction set out in count one, charged that on or about June 5, 1953, he violated Section 206 by offering a bribe to a juror. The evidence shows that on or about June 4, 1953, two days after his first trial on tax evasion charges had ended in a mistrial, Fiore Smaldone, a first cousin of Clyde and George, had contacted Mrs. Caroline A. Baer, a dismissed juror in that first trial. He told her that the boys were in a little trouble and asked her to "hang the jury." There is no evidence that he offered her a bribe of any kind to do so.

The evidence was sufficient to sustain a charge under Section 1503 of endeavoring to obstruct the administration of justice, since Eugene Smaldone's case was still pending in federal court. This was sufficient to sustain the charge, even though the juror had been dismissed, since the essence of the offense was the endeavor to obstruct justice.[8]

The outlined evidence, however, was not sufficient to sustain the charge of bribing or attempting to bribe a juror laid in count nine. To establish that offense there must be proof of more than an attempt to corrupt.[9] It requires an offer of money or a thing of value.

Count two charged an attempt to impede the administration of justice on or about June 6, 1953, in violation of Section 1503, and count ten based on the same transaction charged giving and offering to give money as a bribe to a juror, in violation of Section 206. Count ten is predicated upon the same acts set out in count two. The evidence shows that on June 6, 1953, Michael Benallo contacted Merle D. Hall, a juror on the panel called for the Smaldone income tax case. Benallo introduced himself, saying that he had worked at the fish hatchery and asked Hall if he remembered him. Hall remarked that he did not. Benallo then stated he was just looking up some of the boys he used to

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[8] United States v. Russell, 255 U. S. 138; Broadbent v. United States (10th Cir.), 149 F. (2d) 580; Catrino v. United States, 176 F. (2d) 884.

[9] Slade v. United States (10th Cir.), 85 F. (2d) 786.

know. Nothing was said about jury service. This is the uncontradicted evidence submitted by the Government and is all the evidence as adduced either from Hall or his wife, Mrs. Faye Hall, or his business partner. So here there is no direct evidence or evidence from which a fair inference may be drawn that Benallo's purpose was to interfere with the administration of justice in the Smaldone case by bribing or offering a bribe to juror Hall. It may be suspected that Benallo had an evil purpose in approaching Hall, but mere suspicion does not rise to the dignity of proof.[10] There was therefore no evidence supporting the conviction on either of these two counts. Count three and the corresponding count eleven based upon the same transaction charged Eugene Smaldone with violating Section 1503 and Section 206 on or about June 23, 1953, in the same manner as set out in the previous counts. The evidence to support these charges is that W. E. Lawson, operator of the Oldsmobile Agency in Longmont, Colorado, contacted Owen Spencer, a member of the jury panel about the purchase of a new car. During the conversation, Lawson told Spencer that Eugene Smaldone was not guilty and that he was being framed; that the Smaldones were nice fellows; that they had always treated him nice and he had done lots of business with them. Lawson told Spencer that he knew Spencer was on the jury. When asked how he knew this, he replied that Clyde Smaldone had told him when Clyde had purchased a car from him. At the time of this conversation, Spencer had actually already been dismissed from the jury. Lawson testified that the Smaldones had asked him on June 19 or 20 if he would talk to Spencer if Spencer got on the jury. Lawson replied that he would not. The evidence further shows that the Smaldones contacted Lawson later about three different men on the list of prospective members. He knew one of them and they asked him to contact that man to ask if he would hang the jury if he were selected as a juror. This

[10] Garrison v. United States, 163 F. (2d) 874; Colbaugh v. United States, 15 F. (2d) 929.

effort on the part of the Smaldones to seek through Lawson to influence Spencer, a member of the jury panel, in spite of Lawson's protestation of an innocent intent of contacting Spencer, is sufficient to support a charge of endeavoring to impede the administration of justice under Section 1503 within the broad interpretation of the word, embracing any effort or essay to accomplish the evil purpose that the statute seeks to prevent,[11] but was again wholly insufficient to support a substantive charge under count eleven of bribery or attempted bribery.

Count four charging Eugene Smaldone with violation of Section 1503 on or about July 3, 1953, and count twelve based upon the same transaction charged a violation of Section 206 of bribery or attempted bribery of a juror. A careful search of the records fails to reveal any evidence reasonably tending to support either of these charges and the judgments based thereon must, therefore, fail.

Count five charged Eugene Smaldone with violating Section 1503 on or about September 2, 1953, and count thirteen based upon the same transaction charged him with violating Section 206. The evidence in support of these two counts shows that Eugene Smaldone in the presence of his brother, Clyde, requested Raymond J. SaBell to call on Frank P. Rossi, a juror and to offer him "three fifty" to stay on the jury. SaBell called upon Rossi "the last week of August or the first week of September," in compliance with this request. Rossi told SaBell that he was taking inventory then and would let him know later. SaBell reported to Eugene that everything was all right. This evidence is sufficient to sustain the conviction on both of these counts.

Count six charged Eugene Smaldone with violating Section 1503 on or about September 8, 1953, and count fourteen based on the same transaction charged a violation of Section 206. The evidence in support of these two counts is that William Calvaresi contacted Effie B. Alsup, a prospec-

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[11] United States v. Russell, 255 U. S. 138; Broadbent v. United States, 149 F. (2d) 580.

tive juror, on September 7, 1953, and again on September 9, 1953, advising her that Eugene Smaldone had asked him to offer her $250 to "sit on the jury." This evidence is sufficient to support the conviction on both of these counts.

The Government again with commendable candor at the time of the oral argument stated that counts seven and eight charged the same offense. It follows therefore that they were duplicitous and that the conviction and sentence on count eight cannot stand. Examination of the indictment also reveals that count sixteen of the indictment is predicated upon the same transaction that is set out in count fifteen. The dates are the same; the charge and allegations are the same. It therefore follows as a matter of course that if counts seven and eight are duplicitous, counts fifteen and sixteen are likewise duplicitous and that the judgment imposed on count sixteen must likewise fall. It is only necessary therefore to consider whether the evidence is sufficient to sustain the judgment entered on counts seven and fifteen. Count seven charges the violation of Section 1503 on or about September 10, 1953. The evidence shows that William Calvaresi contacted Effie B. Alsup, a prospective juror, on two occasions, first on September 9, 1953, and again on September 10, 1953. The transaction on September 9, 1953, in which he advised her that Eugene Smaldone had asked him to offer her $250 to sit on the jury is sufficient to support the charge laid in both count seven and count fifteen, predicated upon the same transaction and charging a violation of Section 206.

Summing up, we hold that the record supports the verdict and judgment of conviction entered thereon on counts one, three, five, six, seven, thirteen, fourteen and fifteen, but that there is no evidence to support the verdict or judgment of conviction entered thereon on counts two, four, eight, nine, ten, eleven, twelve and sixteen and that those judgments cannot stand.

Indictment Number 13,795.

Clyde George Smaldone contends that the evidence is insufficient to convict him of more than two of the six counts of the indictment. Counts one and three of the indictment charged him with the same violations with which Eugene Smaldone was charged in counts five and thirteen of indictment Number 13,794. The evidence shows that the efforts by Eugene Smaldone to induce Raymond J. SaBell to call on Frank P. Rossi and offer him $350 occurred in the presence of Clyde George Smaldone. This is sufficient to make him a party thereto and to sustain the conviction and judgment of sentence on counts one and three.

Counts two and four are predicated upon the same acts set out in counts seven and fifteen of indictment Number 13,794. The evidence is sufficient to establish Clyde's connection with that transaction and thus sustain his conviction and judgment of sentence on counts two and four.

Counts five and six of the indictment charged the same offense charged against Eugene Smaldone in counts six and fourteen of indictment Number 13,794 and is predicated on the same evidence set out in relation to those counts. The record shows that Clyde participated in these transactions and was a party thereto. In Number 13,795 we find that the verdict on each of the six counts of the indictment is supported by competent evidence and the judgments based thereon are valid judgments.

Michael J. Benallo

On behalf of Michael J. Benallo, it is urged that the court erred in overruling his motion for a directed verdict of acquittal at the conclusion of the Government's case in Number 13,800.

Benallo was charged only under Number 13,800 with being a member of the conspiracy. He was not charged with having committed a substantive offense. Merle D. Hall, who was a member of the jury panel in question, testified that on June 6, 1953, while at work in his shop at Fort Collins,

a man came in and introduced himself as Mike Benallo; that he stated that he had been at the fish hatchery at Fort Collins and wanted to know if Hall remembered him. When Hall replied that he did not know him, Benallo said he was at Fort Collins looking up some of the boys he used to know. That was the substance of the conversation. Nothing was said about jury service or Hall's connection with jury service or about the Smaldone case. To make one a co-conspirator or a member of a conspiracy, the evidence must establish some connection on his part with the conspiracy or the members thereof.[12] The record does not reveal a single bit of evidence that Michael J. Benallo ever met with any of the other party defendants or that he ever talked to them about the case or that he ever talked to any juror about the case pending against the Smaldones. His trip to Fort Collins may give rise to the suspicion that he went there to contact Hall about the Smaldone case, but a mere speculation or suspicion is not sufficient. Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is favorable to innocence, such circumstance is robbed of all probative value and is insufficient to support a judgment of guilt.[13] We think the motion for a directed verdict in Number 13,800 with respect to Michael J. Benallo was good and should have been sustained.

Contempt Proceedings.

In addition to the criminal trial, appellants were cited to appear and show cause why they should not be found guilty of contempt of court. The acts upon which the contempt proceedings were predicated were the same acts upon which they were prosecuted in the criminal trial. Appellants challenge the jurisdiction of the trial court to summarily try

[12] Dickerson v. United States, 18 F. (2d) 887; Mickle v. United States, 157 F. 229; Glasser v. United States, 315 U. S. 60.

[13] Dickerson v. United States, 18 F. (2d) 887; Hyde v. United States, 15 F. (2d) 816; United States v. Currier Lumber Co., 70 F. Supp. 219; Affirmed, 166 F. (2d) 346; Cravens v. United States, 62 F. (2d) 261; Splitto v. United States, 39 F. (2d) 782.

them in the contempt proceeding on the ground that the acts relied upon did not occur within the actual presence of the court, or so near thereto as to confer jurisdiction on the court under 18 U.S.C.A. § 401 (1) to try them in the summary contempt proceeding. Their objections were overruled and the trial court summarily heard and determined the charges and found appellants guilty of contempt and imposed additional sentences upon them. The pertinent provision of 18 U.S.C.A. § 401 (1) gives the court power to summarily try acts committed "in its presence or so near thereto as to obstruct the administration of justice." This has been the statutory authority for summary contempt proceedings since the Act of 1831. It is conceded that the acts upon which the proceedings were predicated did not occur in the presence of the court. In order therefore to uphold the action of the court in this respect, it must be found that they occurred "so near thereto as to obstruct the administration of justice."

The power of federal courts to issue attachments and inflict summary punishments for contempts of court is a narrow power, much narrower than that in most state courts. The history of our present statute giving federal courts this power is reviewed at length in the late case of Nye v. United States, 313 U. S. 33. The power as it existed prior to the Act of March 2, 1831, as it existed under the Act of 1831, and as it exists under the amendments to that Act, is recited in detail by the Supreme Court in the Nye decision. It is pointed out that the Act of 1831 had for its object restricting the power of federal courts in this respect as it had been expended by judicial interpretation and application and that this purpose was continued in Section 268 of our Judicial Code.[14]

The court in the Nye case makes it clear that the pertinent terms are to be construed as having a geographical meaning and not a casual connotation. The court observed

[14] Section 268 was under consideration in the Nye case and differs in no material respect from 18 U.S.C.A. § 401 (1), the present Act.

that of late lower courts have been giving the terms a broader and expanding meaning as had the Supreme Court in the case of Toledo Newspaper Co. v. United States, 247 U.S. 402. The court in the Nye case rejected this broadening interpretation, including the interpretation which it had placed on this power in the Toledo Newspaper Company case, and readopted the views expressed in the case of Ex Parte Poulson, Fed. Case No. 11,350, where it was held that the first section of the Act " 'alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business.' " The court in the Nye case further states that "The phrase 'so near thereto as to obstruct the administration of justice' likewise connotes that the misbehavior must be in the vicinity of the court." And that "It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence', suggests physical proximity not relevancy." The court observes that "If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' then the conditions which Congress sought to alleviate in 1831 have largely been restored."

We think it is clear from the language of the Nye case that in order to give the court power to summarily try persons for contempt the acts charged must have been in the physical presence of the court or so near thereto as to actively interfere with the trial of the court. It is not sufficient that the impact of acts committed away from the court is carried over into the court room, makes itself felt therein, and has a tendency to obstruct the administration of justice.

The court concluded that it had jurisdiction to proceed as it did because the contempt actually operated within the court room and in the presence of the court. That is just another way of saying that the acts committed miles away

from the presence of the court made themselves felt in the court room throughout the trial but that, under the decision of the Nye case, supra, is not sufficient.

We think the case of O'Malley v. United States, 128 F. (2d) 676, upon which the trial court relied, is clearly distinguishable from the Nye case and from the facts in this case. There a case was pending in the federal court against numerous insurance companies to enjoin the collection of increased insurance premiums. While that case was pending, certain parties in a hotel room removed from the place of the trial concocted a fraudulent scheme by which through the payment of a large sum of money, some to the Insurance Commissioner O'Malley, an agreement would be executed to compromise said litigation. Such an agreement was reached. Bribes were paid and the attorneys representing the insurance commissioner and the companies came into court and, without knowledge of the fraud and bribery, and in good faith represented to the trial judge that the settlement was a good one and should be approved. This was done and the litigation was dismissed. When the fraud was discovered, the trial judge found the parties guilty of contempt in summary contempt proceedings. All that was held in that case was that the acts of contempt consisting of the fraudulent representations made to the court were made by the parties while actually present in court by their attorneys and that therefore the acts of contempt occurred in the presence of the court itself.

Judgments.

In Number 13,800 the judgment of sentence of the court against Eugene Smaldone and Clyde George Smaldone is REVERSED and as to them the cause is REMANDED with directions to DISMISS. Also in Number 13,800 the judgment against Michael J. Benallo is REVERSED and as to him the cause is REMANDED with directions to DISMISS. In Number 13,795 the judgment against Clyde George Smaldone is AFFIRMED. With respect to the

contempt proceedings, the judgments against all of the defendants are REVERSED and the proceedings are REMANDED with directions to DISMISS.

Where a sentence is in part invalid and the invalid portion is separable from the valid portion, the modus operandi to make the correction is not uniform. In some instances the case has been remanded to the trial court to make the corrections,[15] while in others the correction is made in the appellate court.[16] In some of the cases in which the case was remanded to make the corrections in the trial court, the appellate court recognized power in itself to make such correction.[17]

We have held in Number 13,794 that the judgment of sentence imposed on appellant, Eugene Smaldone, on counts two, four, eight, nine, ten, eleven, twelve and sixteen are invalid and must be set aside. These sentences both as to prison terms and fines are separate and distinct from the valid counts and we see no reason why the correction of the judgment appealed from in that case should not be made in this court. It is therefore the judgment of the court that the judgments against Eugene Smaldone imposed on him by counts two, four, eight, nine, ten, eleven, twelve and sixteen, both as to prison term and fine be and each of them is hereby set aside and held for naught and that in all other respects the judgment appealed from by him in said cause be and the same is hereby AFFIRMED.

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[15] Wechsler v. United States, 158 F. 579; Jackson v. United States, 102 F. 473; Kitt v. United States, 138 F. (2d) 842.

[16] Spirou v. United States, 24 F. (2d) 796; Goode v. United States, 12 F. (2d) 742; Salazar v. United States, 236 F. 541; Simmons v. United States, 89 F. (2d) 591; Siglar v. United States, 208 F. (2d) 865.

[17] Jackson v. United States, supra.

APPENDIX B

Judgments of Court Below

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 4833

WILLIAM CALVARESI, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that William Calvaresi, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 4834

JERRY BENALLO, JR., *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Jerry Benallo, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 4835

EUGENE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment and sentence of the said district court in this cause on Counts 2, 4, 8, 9, 10, 11, 12 and 16, both as to prison term and fine, be and each of them is hereby set aside and held for naught, and in all other respects the judgment appealed from is affirmed.

No. 4836

CLYDE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

No. 4837

WILLIAM CALVARESI, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that William Calvaresi, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 4838

JERRY BENALLO, JR., *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Jerry Benallo, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 4839

EUGENE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to dismiss.

No. 4840

CLYDE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to dismiss.

No. 4842

EUGENE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

No. 4843

CLYDE SMALDONE, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

Orders Denying Petitions for Rehearing

Order Denying Petition for Rehearing

(Nos. 4833-4837)
(Nos. 4834-4838)

Second Day, November Term, Tuesday, November 16th, 1954. Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah, and John C. Pickett, Circuit Judges.

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

Order Denying Petition for Rehearing

(Nos. 4835-4839-4842)
(Nos. 4836-4840-4843)

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX D

Orders Extending Time to File Petitions for Writs of Certiorari

---

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners*,

vs.

UNITED STATES OF AMERICA.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15th, 1955.

TOM C. CLARK
Associate Justice of the Supreme Court of the United States

Dated this 10th day of December, 1954.

WILLIAM CALVARESI AND JERRY BENALLO, JR., *Petitioners*

vs.

UNITED STATES OF AMERICA.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15th, 1955.

TOM C. CLARK
Associate Justice of the Supreme Court of the United States

Dated this 13th day of December, 1954.

APPENDIX E

Constitutional Provisions, Statutes and Rules Involved

The *Fifth Amendment to the Constitution* provides in relevant part:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law * * *.

The *Sixth Amendment to the Constitution* provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation * * *."

The *Eighth Amendment to the Constitution* provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The *Act of June 25, 1948*, 62 Stat. 683 et seq., 18 U. S. C., provides in pertinent part:

Section 206, 62 Stat. 692:

Sec. 206. Offer to judge or judicial officer.

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe, to any judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote, opinion, or decision thereon, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be disqualified from holding any office of honor, trust, or profit under the United States.

Section 1503, 62 Stat. 769:

Sec. 1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 371, 62 Stat. 701:

Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The *Act of June 25, 1948*, 62 Stat. 898, as amended May 24, 1949, 63 Stat. 99, 28 U. S. C. Sec. 144 provides:

Sec. 144. Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The *Federal Rules of Criminal Procedure*, following 18 U. S. C. Section 3771, provide in part as follows:

Rule 7. The Indictment and the Information.

(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(b) The Motion Raising Defenses and Objections.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 21. Transfer from the District or Division for Trial.

(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

Rule 25. Judge; Disability.

If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Rule 32. Sentence and Judgment.

(a) **Sentence.** Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) **Judgment.** A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) **Presentence Investigation.**

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

APPENDIX F

Extracts Reflecting Comments and Actions of Trial Judge Tending to Prove Bias and Prejudice and That Petitioners Were Deprived of a Fair Trial

The following represent extracts from the proceedings below reflecting the comments and actions of the trial judge (The Honorable Willis W. Ritter) which tend to prove bias and prejudice and which, when taken together, indicate that the Petitioners were deprived of a fair trial. Where necessary to illuminate the comment or action, the context is stated.

1. Order Forfeiting Bond of Eugene Smaldone in Tax Evasion Case

During the first Eugene Smaldone tax evasion trial, when Eugene Smaldone was taken to the hospital from the courtroom for an emergency operation during the course of the trial, Judge Ritter ordered his appearance bond forfeited. This was held by the Tenth Circuit to have constituted an abuse of discretion and the order of forfeiture was reversed. While the episode is described fully in the opinion of the Court of Appeals reported at 211 F. 2d 161, *Smaldone* v. *United States,* the conclusion alone is appropriate here.:

> "But the stark facts * * * established an unrebutted prima facie showing that *justice did not require* the enforcement of the forfeiture and that the denial of the motion to vacate the judgment and the denial of the motions for remission of the forfeiture *constituted an abuse of discretion.*" 211 F. 2d at 165-6. (Emphasis added)

2. Increasing Bail Sua Sponte

After setting bail for each of the Petitioners at $50,000 on the morning of September 21, 1953, Judge Ritter *sua sponte* increased bail to $100,000 for Petitioners Calvaresi and Benallo, and $200,000 for Eugene and Clyde Smaldone later that same day without any stated reason (R. 12, 76, 91, 105).

3. Catering to the Press

Upon the issuance of orders relating to the administration of the trial, Judge Ritter ordered the "Information to be given to the Press." (R. 12-13, 76). Moreover, while the Judge made this order applicable to increases in bail, he did not order that information relating to his orders reducing bail also be given to the Press. (R. 18, 79).

4. Setting Excessive Bail

a. Order of September 21, 1953 fixing bail for each Defendant in Cases Numbered 13775, 13776, 13777 and 13778 at $100,000 each in each case (R. 12).

b. Orders of September 25, 1953 fixing the bail of Eugene Smaldone at $200,000 in Case No. 13794 (R. 91), and of Clyde Smaldone at $200,000 in Case No. 13795 (R. 105).

c. Order of September 28, 1953 fixing bail of Eugene Smaldone, Clyde Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, and Micheal J. Benallo at $200,000 each in Case No. 13,800 (R. 121).

d. Order of October 16, 1953 fixing bail of Eugene Smaldone, Clyde Smaldone, William Calvaresi, Jerry Benallo, Jr., Fiore Smaldone, Louis F. Smaldone, Micheal J. Benallo, and Joseph Cefalu at $200,000 each in Case No. 13833 (R. 158).

e. Order of October 26, 1953 fixing bail on the charge of criminal contempt for each defendant in the amount of $25,000 (R. 190), which may have been waived for some of the defendants (R. 199-200).

f. For the four Petitioners, bail set by Judge Ritter, as pieced together from references throughout the record, appears to have reached the following amounts:

Eugene Smaldone	$1,200,000
Clyde Smaldone	$1,100,000
William Calvaresi	$800,000
Jerry Benallo, Jr.	$700,000.

5. Refusal to Grant Reduction of Bail and Bail Pending Appeal; and Reversal by Court of Appeals

a. Motion of October 2, 1953 for reduction of bail of William Calvaresi held in abeyance by Judge Ritter on that date (R. 13-17).

b. On October 12, 1953, Judge Ritter reduced the bail of Calvaresi from $800,000 (R. 18), and Jerry Benallo, Jr. from $700,000 to $400,000 (R. 77-79).

c. Subsequently, the Tenth Circuit reduced bail for Calvaresi and Jerry Benallo, Jr., to a total of $25,000, each (R. 18).

d. Judge Ritter denied bail pending appeal to Calvaresi and Jerry Benallo, Jr., on November 23, 1953 (R. 71, 84), and in each instance thereafter the Tenth Circuit granted the bail at $25,000 each (R. 74, 84).

6. Denying Motions for Continuance After Granting Motions to Consolidate Various Cases the Day of the Trial

a. Motion of the United States, dated October 22, 1953, to join for trial Cases Numbered 13777, 13778, 13794, 13795, 13796, 13797, 13801, 13802 and 13800 (R. 69-70).

b. Motion of the United States dated October 23, 1953 to join for trial Cases Numbered 13794, 13795 and 13800 (R. 93-4).

c. Oral request by United States, on October 26, 1953, to withdraw motions of October 22 and 23, 1953 (a. and b. *supra*) (R. 228), accompanied by new motion by United States to consolidate for trial Cases Numbered 13777, 13778, 13794, 13795 and 13800 (R. 229-30). The request to withdraw previous motions and the new motion were granted on the day of the trial (R. 135, 238).

d. Defendants' request for continuance on the grounds that they "came to Court this morning * * * [with] no idea

what case [they] were going to defend" (R. 229) and because there had been no time in view of the sudden consolidations "to properly prepare for trial of said charges" (R. 243), were denied (R. 243).

7. Refusal to Rule on Plea of Double Jeopardy Until After Trial

Motion was made by all Defendants to have pleas of double jeopardy decided prior to trial and to stay all proceedings until that issue was determined:

(1) Clyde and George Smaldone because, if their defense of double jeopardy was sustained, they would be in jeopardy twice for the same offense once the trial began (R. 235, 240); and

(2) the other defendants because, being tried in the same trial on the same offenses to which two defendants had pleaded guilty, would be a highly prejudicial joinder (R. 232-3). Judge Ritter denied the motion (R. 243) and reserved the ruling on the plea (R. 135) and, at the conclusion of the trial overruled the plea (R. 472).

On appeal, the Tenth Circuit reversed, holding that the plea of double jeopardy should have been sustained by Judge Ritter (Appendix A. *supra*, pp. 15-16).

8. Misuse of the Contempt Power

Judge Ritter held all of the defendants guilty of criminal contempt for the same acts as were alleged in the indictments on which they were tried (R. 480), and sentenced each of them separately and additionally for contempt (R. 486-7). The Court of Appeals for the Tenth Circuit held this to be error and outside the power of the trial judge and reversed the convictions (Appendix A, *supra*, pp. 22-26).

As to these proceedings in the trial court:

a. The Motion of the United States was filed on October 26, 1953, the day of the trial (R. 172-3), without prior service on defense counsel (R. 189).

b. Judge Ritter issued a *forthwith* show cause order on October 26, 1953 (R. 174, 190), taking all defendants into *immediate custody* subject to $25,000 bail each, and setting the matter for *immediate trial* (R. 174).

c. Upon request of defense counsel, Judge Ritter then granted a brief recess so that defense counsel could "try and determine what action might be taken on it" (R. 194-5).

d. Following the recess, counsel requested additional time to consider the motion. Some of the colloquy as reported in the record is as follows:

> "Mr. Rice: * * * We have had a very brief time to look into this matter. First, just for the record, I would like to see if I understand what happened here this morning. My understanding is that the District Attorney filed the Motion for criminal contempt proceedings. The Court then signed a Notice and Order, directing that the Notice and Order and Motion be served on the Defendants. Is that correct, Your Honor?
>
> "The Court: Well, you have a copy of it. I read the Motion and the Order and signed the Order and I don't want to place any interpretation upon it. You have been served with it.
>
> "Mr. Rice: Thereafter, it is my understanding that the Court ordered—or entered an Order that each of the Defendants be taken into custody of the United States Marshal and be held in bond in the amount of $25,000.00. Now, I ask, that is what I understood of the Court's Order, but I am not positive of it?
>
> "The Court: Yes, that was the Order.
>
> "Mr. Rice: If the Court please, then, at this time, on behalf of the Defendant Michael J. Benallo we ask that the Notice and Order that the Court signed this morning be vacated, for the reason: That it does not comply with the Rules of Criminal Procedure. I would like to call Your Honor's attention to Rule 42; Rule 42-A, 'Summary Disposition. A criminal contempt may be punished summarily if the Judge certifies that he saw—'

"The Court: (interposing) That doesn't apply; get down to B.

"Mr. Rice: * * * (Read B).

"Now, I call the Court's attention to this Notice which we received. It doesn't comply with the Rule as I read it. It is an Order for a forthwith hearing, which is contrary to the provision that we should have a reasonable time to prepare a defense.

"The Notice does not set forth any facts at all, according to the Rule—that's provided in the Rule. We feel that the Order was just not a proper Order to be entered and it should be vacated, Your Honor.

"The Court: Is there anything further?

"Mr. Rice:Well, your Honor, I also call the Court's attention to the fact that this contempt, supposedly, is based on the evidence that will be produced here in the trial of these causes.

"The Court: Well, isn't that the answer to the whole business? The Order to Show Cause why they should not be found in criminal contempt, is as the Motion states, based upon the same character that appears 'to obstruct justice and with offering a bribe to various petit jurors' and in paragraphs 2 and 3 with the violations of certain Sections of the United States Code.

"Now, isn't the nub of the whole business that the evidence that comes in on the conspiracy and substantive charges is also the evidence and identical, which will come in on the contempt charge?

"Mr. Rice: Frankly, I don't know, your Honor. We have no way of telling.

"The Court: That's what they say in their Motion.

"Mr. Rice: As I read the Rule it says these facts should be set forth in the Notice. In the Notice we have there isn't one single solitary fact set forth.

"The Court: Along with the Notice you have the Motion.

"Mr. Rice: But the Motion doesn't set forth any facts as the Rule requires. Also, Your Honor, there hasn't been any reasonable time or place set for this hearing. The Rule specifically states that we should have a reasonable time within which to prepare a defense and the Rule also says we are entitled to a trial by Jury and we have not had that opportunity.

"The Court: It says that—if the Statutes provide:
"Mr. Rice: We have not had the opportunity to search the Statutes to see whether we are entitled to trial by Jury. * * * (196-199).

* * * *

"Mr. Mancini: On behalf of the Defendant Michael J. Benallo also we want the record to show that we are asking this Court for at least ten days' time within which to file a Motion and/or an Answer as to this contempt citation.

"The Rules provide that we shall have a reasonable time to make preparation to meet this particular charge. We knew nothing of its existence until this morning and we at this time ask that we be given at least ten days' time in which to file Motion and/or Answer to the contempt citation.

"Mr. Morrissey: If the Court please, on behalf of the Defendants Eugene Smaldone and Clyde George Smaldone also, we join in this request.

"Mr. Berger: On behalf of the defendants William Calvaresi and Jerry Benallo, Jr., we join in this request, Your Honor." (R. 201-2).

9. The Reduction of Bail and Sentencing Procedures

a. In the period just prior to trial, when the Defendants made motions for reduction of bail, Judge Ritter refused to decide the motions quickly, despite the pleas of defense counsel that the release of some of the defendants was necessary to prepare the defense (R. 40). He insisted instead on sufficient time to make what he called "an informed judgment".

"The Court: * * * I think that the discretion of the Court on the matter of reduction of bond ought to be based upon full information. I think the judgment to reduce the bond or not to reduce the bond ought to be an informed judgment, and it has been my thought, I expressed here the other morning at the arraignment, that the Government supply me with the transcript of the Grand Jury proceedings so that I can see exactly what is involved, and I ask you gentlemen to supply me with the background, connections, and so forth of

these people, and I have asked for a third thing, I have asked the Treasury Agents and Government Agents to supply me with the results of their investigation. Now, until I get that, I don't see how I can make an intelligent decision about the matter." (R. 21).

b. But after trial, Judge Ritter dispensed with the usual presentence investigations (Rule 32(c), Federal Rules of Criminal Procedure), and did not give the Defendants an opportunity to make statements on their own behalfs (Rule 32(a), Federal Rules of Criminal Procedure; see also Appendix A, *supra*, p. 14) before imposing sentence.

c. Despite strenuous objection of counsel, Judge Ritter insisted upon imposing sentence upon Petitioners Clyde and Eugene Smaldone in Case Number 13833 (R. 482), though these Petitioners had given their plea to another Judge who was not shown to be at the time of sentencing absent from the district, dead, sick or otherwise disabled in accordance with Rule 25, Federal Rules of Criminal Procedure. See also Appendix A, *supra*, p. 15.

d. Finally, after imposing sentences upon all of the Defendants of terms which the Tenth Circuit characterized as "severe" (Appendix A, *supra*, p. 13), Judge Ritter thereupon sentenced each of the Defendants "to the same terms in the Federal Penitentiary and to the same fines as in the indictments already—upon which you have already been sentenced, and the Court suspends the sentences in the contempt matter, conditioned upon the serving of the sentences and the paying of the fines in the other matters." (R. 486-7).

10. The Judge's Announced Attitude With Regard to the Defendants and the Issues Involved

a. With regard to the issues:

> "The Court: Well, I tell you, counsel, treason and murder cases in my view are no worse than an attempt to bribe a juror in a court of justice." (R. 37).

b. With regard to the Defendants:

(Micheal J. Benallo, charged in Case No. 13800 (conspiracy), was convicted in the district court but his conviction was reversed by the Court of Appeals because "the record does not reveal a single bit of evidence" linking him to the conspiracy. Appendix A, *supra*, p. 22. But prior to trial he was held in $500,000 bail (R. 37). The following colloquy occurred during his counsel's argument in support of a motion to reduce his bail:)

> "The Court: He is a relation of the Smaldones, isn't he?
>
> "Mr. Rice: No blood relation at all.
>
> "The Court: Isn't Benallo related to them?
>
> "Mr. Rice: There is no blood relationship. Mr. Vigil may be advised.
>
> "The Court: Somewhere during all this week I got the notion he was, that only one of them was not. I had a notion that Benallo was,
>
> "Mr. Rice: I am sure there is no blood relationship there, maybe some relationship by marriage.
>
> "The Court: Is there some relationship by marriage?
>
> "Mr. Rice: I believe that Mr. Benallo's mother at one time was married to a Smaldone.
>
> "The Court: Well, I guess that is the relationship I was being told about." (R. 35-6).

(The judge then reserved decision on the motion (R. 42).)

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 538

WILLIAM CALVARESI AND JERRY BENALLO, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 548

EUGENE SMALDONE AND CLYDE SMALDONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (J. A. 1-26)[1] is reported at 216 F. 2d 891.

[1] The symbol "J. A." refers to the Joint Appendix accompanying the petitions for writs of certiorari. The symbol "Pet. I" refers to the petition for writ of certiorari filed by Calvaresi and Benallo, and the symbol "Pet. II" refers to the petition filed by Eugene and Clyde Smaldone.

JURISDICTION

The judgments of the Court of Appeals were entered on November 2, 1954 (J. A. 27–31, 2), and the petitions for rehearing were denied on November 16, 1954 (J. A. 31). On December 10, 1954, the time for filing a petition for a writ of certiorari by Eugene and Clyde Smaldone was extended by order of Mr. Justice Clark to January 15, 1955 (J. A. 32), on which date their petition was filed. On December 13, 1954, the time for filing a petition for a writ of certiorari by Calvaresi and Benallo was extended by order of Mr. Justice Clark to January 15, 1955 (*ibid.*). They filed their petition on January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).[2]

QUESTIONS PRESENTED

1. Whether the indictments, which charged petitioners with the substantive offenses of obstructing justice by tampering with jurors and with the bribing of jurors, were legally insufficient because the jurors involved were not named.

2. Whether 18 U. S. C. 206, making it an offense to bribe a juror, covers bribery of a juror who has been summoned on a panel but has not been selected and sworn to sit in a particular case at the time the bribe is extended.

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[2] Petitioners were tried together in the District Court and both petitions can be conveniently answered in one brief in opposition.

3. Whether the trial court was biased and prejudiced against petitioners.

4. Whether petitioners were denied a fair trial as a result of unfavorable press, radio, and television publicity given their case during the period that preliminary proceedings were held.

5. Whether petitioners were prejudiced by being tried jointly.

6. Whether a single agreement envisaging violation of two statutes constitutes two separate offenses of conspiracy for which separate sentences may be imposed. (The Government concedes that the answer is "no," but, as indicated *infra,* believes that the question, as to two petitioners, is academic, and, as to the remaining two, that it is prematurely raised.)

STATUTES INVOLVED

18 U. S. C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or hav-

ing attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 206 provides:

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe, to any judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote, opinion, or decision thereon, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be dis-

qualified from holding any office of honor, trust, or profit under the United States.

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

The Indictments and Sentences.—During September and October 1953, a series of conspiracy and substantive indictments, involving alleged acts of jury tamperings, were filed against petitioners and others in the United States District Court for the District of Colorado (R. 10–12, 75–76, 85–91, 102–104, 112–121, 148–158).

There were two conspiracy indictments (R. 112–121, 148–158). One of these, No. 13800, charged, in two counts, that, commencing about June 1, 1953, and continuing to the date of the indictment, petitioners, together with one Michael Benallo and others, had conspired to violate 18 U. S. C. 1503, by obstructing the due administration

of justice, and that, during the same period, they had conspired to violate 18 U. S. C. 206, by offering a bribe to jurors, all in violation of 18 U. S. C. 371 (R. 112–121). The two counts of the second conspiracy indictment (No. 13833), except for the fact that each named an additional defendant and each alleged two additional overt acts relating to such defendant, were substantially the same as the corresponding counts in No. 13800 (R. 148–158).

Each of four substantive indictments named one of the four petitioners, individually, and charged him (in two or more counts) with substantive offenses based upon the pertinent overt acts alleged in the conspiracy indictments (R. 10–12, 75–76, 85–91, 102–104). In each of these substantive indictments, one-half of the counts charged obstruction of justice; the remaining half, bribery of a juror or jurors.

Before trial, petitioners Eugene and Clyde Smaldone pleaded guilty to both counts of conspiracy indictment No. 13833 (R. 158–159, 162–164) and not guilty to the charges of the other indictments. Their co-defendants pleaded not guilty to all charges (R. 91, 105, 122. 13, 76–77, 162–163).

All of the indictments, except the second conspiracy indictment (No. 13833), were consolidated for trial (R. 70, 82, 96, 107, 135, 229–230, 238). After a severance of some of their co-defendants in conspiracy indictment No. 13800,

petitioners were tried together by a jury and found guilty on all charges on October 29, 1953 (R. 135, 230, 71, 82, 97, 107, 136).[3]

The sentences which remain in the case after decision of the Court of Appeals are as follows:

Eugene Smaldone, on eight substantive counts, a total of twenty-five years' imprisonment and $11,000 fine (R. 98–99; J. A. 26, 28); on conspiracy indictment No. 13833, to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the sentences on the substantive counts (R. 165–166).[4]

Clyde Smaldone, on six substantive counts, a total of fifty years' imprisonment and a $24,000 fine (R. 107–108). On the conspiracy indictment to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the judgment on the substantive counts (R. 166–167).

William Calvaresi and Jerry Benallo, on four and two substantive counts, respectively, fifteen years' imprisonment and $5,000 fine as to each petitioner (R. 72–73, 82–83); on conspiracy indictment No. 13800, as to each petitioner sus-

[3] Michael Benallo was also tried and convicted with petitioners on conspiracy indictment No. 13800, but his conviction was reversed on appeal (J. A. 25).

[4] A suspended sentence on the conspiracy charge which was tried was reversed on the ground that trial thereunder was double jeopardy in view of the plea of guilty (J. A. 25). Eight of sixteen substantive counts were reversed (J. A. 26, 28).

pended terms of five years' imprisonment (R. 138–140).[5]

Government's Evidence.—The pertinent evidence adduced by the Government may be summarized as follows:

On June 2, 1953, petitioner Eugene Smaldone was a defendant on trial in a criminal tax case in the United States District Court for the District of Colorado. On June 3, 1953, his trial was continued until June 10, 1953, because of his illness. After a resumption of the trial, a mistrial was declared on June 12, 1953, and the case was set down for September 21, 1953, for a retrial. (R. 443, 438, 439, 440.)

A few days following the continuance of the trial, Fiore Smaldone, a first cousin of Eugene and Clyde Smaldone, visited one Mrs. Baer, an acquaintance whom he had not seen for about thirty years (R. 374–375, 378, 381, 382–383, 385, 391). He asked her to "hang the jury", in the Smaldone case (R. 381, 384) and expressed surprise when Mrs. Baer informed him that she had been discharged from the jury panel (R. 381).

On or about June 19, 1953, Fiore Smaldone and petitioner Clyde Smaldone visited one Lawson, with whom they had previously done business, at his automobile agency in Longmont, Colorado (R. 410, 411, 412, 414, 409). They discussed with him

[5] The trial court had also found petitioners guilty of contempt of court on the basis of the evidence adduced at the trial (R. 172–174, 175, 479–480), but the Court of Appeals reversed these convictions (J. A. 26).

Eugene Smaldone's tax case and inquired about Lawson's business acquaintance, Owen Spencer, who was on the federal jury panel (R. 411, 403). They told Lawson that Spencer was on the jury panel and asked whether he "would talk to him [Spencer] if he got on the jury" (R. 411, 404–405). On June 23, 1953, Lawson, while negotiating to sell Spencer a new car, engaged him in a discussion of the Eugene Smaldone tax case, telling him that Smaldone was not guilty and that "he thought he was being framed" (R. 403, 404, 405, 412). Lawson, while discussing Spencer's prospective jury service, offered to make him "a good car deal" (R. 405).

During August, 1953, Fiore Smaldone and petitioner Clyde Smaldone again visited Lawson (R. 412–413). They showed him what they described as a prospective jury list and asked him about three names appearing thereon (R. 413, 417). When he stated that he knew one of the three, they asked him to try to "influence" that individual to "hang the jury" in the tax case (R. 413, 415).

About the beginning of September, 1953, Eugene Smaldone, accompanied by Clyde Smaldone, asked one SaBell to convey his offer of "three-fifty" to Frank Rossi to "sit on the jury in the Eugene Smaldone tax trial" (R. 364, 365–367, 368, 369, 360). SaBell conveyed the offer to Rossi. Rossi, at that time, had not received a jury summons. Subsequently, however, he was

called to the panel. (R. 367–368, 360, 361.) SaBell then reported to Eugene Smaldone that "everything was all right" (R. 368).

In September, 1953, Clyde Smaldone spoke to one Roland, who had obtained some insurance for the Smaldones (R. 370–371). He told Roland that there were "several insurance men on the present jury panel," and, showing him a list of names, asked whether he could identify some of them (R. 372). After Roland identified one name, Clyde Smaldone asked whether the man could be influenced (R. 372–373).

During the early part of September, 1953, Eugene and Clyde Smaldone visited one Walton, their insurance broker (R. 356–357). They asked him whether he knew a certain insurance man. Walton was uncertain. Subsequently, Eugene Smaldone repeated the visit, seeking the same information. (R. 357–358.)

On September 7, 1953, petitioner Calvaresi visited his neighbor, one Mrs. Alsup, who had been summoned for federal jury duty during the September term (R. 323, 326, 332). He told her that Eugene Smaldone had asked him to offer her $250 if she "would sit on the jury" in his case (R. 324, 326, 327, 328, 342–343). On September 9, Calvaresi again visited Mrs. Alsup and repeated the offer (R. 324).[6] He also told

[6] An F. B. I. agent testified that Calvaresi had given him an oral statement admitting that he importuned Mrs. Alsup at the behest of Eugene and Clyde Smaldone (R. 346, 349–352).

her that "somebody was going to get the money" and that it might as well be she (R. 326).

A week later, petitioner Jerry Benallo, an acquaintance of Mrs. Alsup, also visited her (R. 325, 329, 330, 335, 336). He told her that if she "would string along" with the Smaldones, "they would have a nice little gift" for her (R. 325, 330, 337, 339).

About mid-September, Eugene Smaldone called one McCusker to a tavern, where he showed him a list of names. McCusker identified the name of Miss Buschbach, whose father he knew. (R. 430, 432, 425.) Smaldone then asked McCusker to see Buschbach and to inquire concerning the daughter's sentiments about the tax case (*ibid.*). He also told McCusker that he might offer Buschbach $500 (R. 432, 435). McCusker then visited Buschbach and discussed with him the daughter's attitude toward the tax case (R. 433, 436–437).

None of the petitioners testified or offered any evidence in his own behalf, except that petitioners Calvaresi and Benallo offered evidence of good reputation (R. 447–454).

ARGUMENT

1. The substantive indictments on obstruction of justice charged that on a specified date, the respective petitioner

> did corruptly and by threats and force and by threatening communication endeavor to influence, intimidate and impede a petit

> juror of the United States District Court, sitting in and for the District of Colorado, and corruptly and by threats and force and by threatening communication influenced, obstructed, impeded and endeavored to influence, obstruct and impede the due administration of justice in the trial scheduled for the 21st day of September, 1953, The United States of America versus Eugene Smaldone, also known as Checkers Smaldone, in violation of Title 18 USC, Section 1503 [*e. g.* R. 10–11].

The bribery counts charged that, on the same occasions, the respective petitioner

> did directly and indirectly give and offer to give money and a thing of value and a promise and agreement therefor and a bribe to a juror summoned to the panel in the cause of the United States versus Eugene Smaldone, also known as Checkers Smaldone, because of and with intent to influence said juror's action, vote, opinion, and decision thereon, contrary to and in violation of Title 18 USC, Section 206 [*e. g.* R. 11].

Petitioners' contention (Pet. I, 23–25; Pet. II, 13–17), that the substantive indictments are void because they do not identify the jurors to whom they refer, is without merit.[7] An indictment is void for insufficiency where it fails to charge the

[7] Petitioners do not challenge here the sufficiency of the conspiracy indictments upon which their convictions were affirmed (Pet. I, 24–25; Pet. II, 2, 16).

essential elements of an offense, or where the defect goes to jurisdiction. See Rule 12 (b) (2), F. R. Crim. P. The identity of the jurors, although, as the court below noted (J. A. 9), material in the proof of the offenses charged in the substantive indictments, was not an essential element of the offenses. The assertion (Pet. I, 23–25; Pet. II, 13–17) that the failure of the court below to dismiss the substantive indictments for insufficiency was inconsistent with its statement that the identity of jurors was material to the proof under such indictments completely overlooks the basic distinction between essential matters of pleading and material elements of proof. Without identifying the jurors, the substantive indictments concretely charged two types of offenses: that petitioners, on specified dates, corruptly endeavored to influence petit jurors sitting in the United States District Court for the District of Colorado and thereby impede the due administration of justice in the trial of *United States* v. *Eugene Smaldone,* scheduled for a certain date; and that, on the same dates, petitioners offered bribes to jurors summoned to the panel in the case of *United States* v. *Eugene Smaldone.* Thus, the indictments were sufficient to apprise petitioners of the nature of charges they had to meet and to enable them to plead former jeopardy in the future. See *United States* v. *Josephson,* 165 F. 2d 82, 85 (C. A. 2), certiorari denied, 333 U. S. 838; *Carter* v. *United States,*

173 F. 2d 684, 685 (C. A. 10), certiorari denied, 337 U. S. 946; *Robertson* v. *United States,* 168 F. 2d 294 (C. A. 5).[8]

There is no occasion to consider whether the failure to name the jurors constituted a non-jurisdictional defect. Under Rule 12 (b) (2), F. R. Crim. P., a defect of that character is waived unless raised by motion before trial. See *United States* v. *Williams,* 203 F. 2d 572, 573 (C. A. 5); *Michener* v. *United States,* 170 F. 2d 973, 975 (C. A. 8); *Weatherby* v. *United States,* 150 F. 2d 465, 466 (C. A. 10). No such motion was made.[9]

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[8] The claim of petitioners Calvaresi and Benallo (Pet. I, 24), that the substantive indictments were void for failure to charge that petitioners knew that the persons they approached were jurors, is without substance. The allegations that they tried to influence the action of jurors in a named case necessarily alleges that they knew the persons were jurors. See *Parsons* v. *United States,* 189 F. 2d 252 (C. A. 5).

[9] Motions for bills of particulars, seeking, *inter alia,* the names of the jurors (R. 66–69, 80–82, 92, 106, 122–125, 130–131) were denied before trial (R. 70, 82, 96, 107, 135). This was apparently an attempt to find out what witnesses the government intended to use. The names on the panel which was to try Smaldone were available to petitioners and the dates of the attempts to approach the jurors were specifically given in the indictment. Petitioners do not show that the denial prejudiced them in meeting the charges of the indictment. Under the circumstances, the denial of the motions was not an abuse of discretion. *Gates* v. *United States,* 122 F. 2d 571 (C. A. 10), certiorari denied, 314 U. S. 698; *Truck Drivers' Local No. 421, etc.* v. *United States,* 128 F. 2d 227 (C. A. 8); *Chadwick* v. *United States,* 117 F. 2d 902 (C. A. 5), certiorari denied, 313 U. S. 585; *Landay* v. *United States,* 108 F. 2d 698 (C. A. 6), certiorari denied, 309 U. S. 681; see also *United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari

2. Petitioners urge (Pet. I, 25–28; Pet. II, 32–35) that the provisions of 18 U. S. C. 206, making it an offense to bribe a juror, should not be deemed to cover bribery of a person who has been summoned on a panel but has not been selected and sworn to sit in a particular case. But the statutory language is plainly broad enough to cover veniremen. It provides that it shall be an offense to bribe *"any * * * juror * * ** authorized by any law of the United States to hear or determine *any question, matter, cause, proceeding, or controversy,* because of or with intent to influence his action, vote, opinion, or decision thereon" (emphasis added). Thus, it necessarily covers a juror summoned on a panel, because as soon as one is so summoned, and until finally discharged, he is a person authorized by law to hear any cause which may be presented in the court, and his actual selection for service on a particular jury merely furnishes him the proper occasion for the exercise of that authority.

The word "juror", itself, has been used almost universally to denote "any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled or not." *United States* v. *Marsh,* 106 Fed. 474, 481 (C. A. 5); see *United States* v.

denied, 323 U. S. 799. Moreover, the motions by Calvaresi and Benallo with respect to the substantive indictments, filed more than ten days after arraignment (R. 13, 69, 76, 80), were not timely under Rule 7 (f), F. R. Crim. P.

Russell, 255 U. S. 138; *People* v. *Newmark*, 312 Ill. 625, 144 N. E. 338; *State* v. *Maddox*, 80 S. C. 452, 61 S. E. 964; *Marvin* v. *District Court*, 126 Iowa 355, 102 N. W. 119; *State* v. *McCrystol* (La.), 9 S. 922; *Baumgartner* v. *Joughin*, 105 Fla. 335, 141 So. 185. Indeed, in *United States* v. *Russell*, 255 U. S. 138, this Court construed the predecessor of 18 U. S. C. 1503, which punishes, *inter alia*, the intimidation of jurors, to include veniremen. Certainly, there is no reason to suppose that Congress intended to deal more narrowly with corruption of jurors than with intimidation of jurors. It is equally difficult, as the court below stated (J. A. 9), to believe that Congress "intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case."[10]

3. Petitioners claim (Pet. I, 28–31; Pet. II, 27–29) that the trial judge's actions and comments before and during trial evidenced such bias against petitioners as to deny them a fair trial.

[10] There is no basis to the suggestion of petitioners' Calvaresi and Benallo (Pet. I, 25, 28) that the instant decision is in conflict with *United States* v. *Sager*, 49 F. 2d 724 (C. A. 2), which held that the terminology of the predecessor of section 206 did not cover a juror at all. The section was amended for the specific purpose of closing the gap revealed by the *Sager* decision. See 18 U. S. C. 206, Reviser's Note.

In the court below, petitioners argued that the trial judge erred in refusing to grant their motions for his disqualification, and that his various rulings during the trial (such as denying without a hearing their motions for acquittal, invoking the contempt power against them, and imposing severe sentences without inquiring whether they desired to make any statements in their own behalf [11]) confirmed their claims of personal bias and prejudice (R. 1–7; J. A. 38–46). The Court of Appeals, after holding that petitioners' affidavits in support of their motions for the trial

[11] Petitioners' claim (Pet. II, 37–39; Pet. I, 33–34) that the trial court committed reversible error in failing to inquire, prior to imposition of sentence, whether petitioners desired to make statements in their behalf, is without merit. Under the circumstances, the error, if any, was harmless. *Shockley* v. *United States*, 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C. A. 2). The court below (J. A. 14), although recognizing that in accordance with "the spirit" of Rule 32 (a), F. R. Crim. P., a trial court should ask if a defendant wishes to make a statement in his behalf, noted that petitioners had not "asked or indicated that they desired to make a statement either in person or through competent attorneys representing them, who were then present in court." It then held that, "In the absence of such a request by competent counsel representing them at the time, we cannot say that they were not afforded an opportunity to be heard before sentence was imposed, had they desired such a hearing" (J. A. 14). The pertinent provision of Rule 32 (a) was intended primarily to prohibit the judge from denying defendants the right to make a statement rather than to impose upon him a mandatory duty to inquire whether a defendant desired to make a statement. Cf. *Federal Rules of Criminal Procedure*, New York University School of Law Institute Proceedings (1946), p. 205.

judge's disqualification before trial were, as petitioners now appear to concede (Pet. I, 29; Pet. II, 27), legally insufficient, held further that the matters concerning which petitioners complained related "largely to the exercise of discretion by the court and in themselves alone are not sufficient to show bias and prejudice" (J. A. 12, 13). And it concluded, from a very careful examination of the record (see J. A. 12), that there was no basis for holding "that the trial court's exercise of discretion was arbitrary" (*ibid.*).

It is significant that the petitioners do not point to anything which happened at the trial itself to support their conclusion that they were denied a fair trial. The record shows that, although petitioners made few objections to the evidence during the trial, the court sustained most of their objections and was careful to prevent the reception of improper evidence (R. 324–325, 338–339, 343, 344, 346–347, 348, 354, 358, 361, 362–364, 365, 373, 375–377, 378–381, 382, 383, 385–387, 388, 393–394, 401–402, 404, 408–409, 410, 417, 421–422, 424, 425–430, 436, 438–444). To say that the trial judge erred in some of his rulings, *e. g.*, finding petitioners in contempt of court on the basis of the offenses proved against them at the trial, does not establish bias or prejudice. See *Berger* v. *United States,* 255 U. S. 22, 31. As the Court of Appeals concluded, after its study of the record, the trial was fairly conducted, and the actions of the judge which formed the pri-

mary basis of complaint did not show any "aggressive antipathy" or such "a bent of mind" as to "prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U. S. 22, 33; *Eisler* v. *United States*, 170 F. 2d 273 (C. A. D. C.); see also *Connelly* v. *United States District Court*, 191 F. 2d 692 (C. A. 9).

4. Petitioners contend (Pet. I, 31–33; Pet. II, 21–27) that unfavorable press, radio and television publicity given their case at the time of their arrest and during the various stages of preliminary proceedings so inflamed public opinion against them that they could not receive a fair trial in the District of Colorado, and that the trial court abused its discretion in denying their motions for change of venue.[12] There is, however, no evidence of any communal prejudgment of the instant case. And, as the court below pointed out (J. A. 13), "There is no affirmative evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror." It is a relevant consideration, moreover, that the evidence overwhelmingly proved petitioners' guilt on most counts.[13] Indeed, save for

[12] Petitioners made no motion for continuance on the ground that they were tried in a hostile atmosphere. Such motion was made on other grounds (R. 242, 243).

[13] The fact, upon which petitioners place some reliance (Pet. I, 33; Pet. II, 22), that several counts on which the jury returned a verdict of guilty were reversed by the court below for lack of evidence, "is not", as the court below held,

some reputation evidence on behalf of Calvaresi and Benallo, petitioners offered no evidence in their defense.

The claim that bias is to be imputed to an entire community requires a strong showing. *Stroble* v. *California,* 343 U. S. 181; *Dennis* v. *United States,* 339 U. S. 162, 168, 171–172; *Frazier* v. *United States,* 335 U. S. 497; *Shockley* v. *United States,* 166 F. 2d 704, 709–710 (C. A. 9), certiorari denied, 334 U. S. 850; see also *Finnegan* v. *United States,* 204 F. 2d 105, 110 (C. A. 8), certiorari denied, 346 U. S. 821; *Rakes* v. *United States,* 169 F. 2d 739, 746–747 (C. A. 4), certiorari denied, 335 U. S. 826. Prejudice sufficient to establish grounds for change of venue must be measured by its effect on jurors called to sit in judgment, and must be of sufficient intensity to preclude the attainment of "that fundamental fairness essential to the very concept of justice." *Stroble* v. *California, supra,* at 191–193; cf. *Holt* v. *United States,* 218 U. S. 245, 248; *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965. Unless the existence of such conditions is apparent, blanket allegations of bias are more properly reserved for examination on *voir dire,* at which time the attitudes and prejudgments of veniremen can be more accurately tested on full examination. *Colosacco* v. *United States,* 196 F. 2d 165, 168 (C. A. 10); cf. *Reynolds*

"sufficient in itself to convict a jury of bias and prejudice" (J. A. 13).

v. *United States,* 98 U. S. 145, 155–156; *Allen* v. *United States,* 4 F. 2d 688, 696–698 (C. A. 7); see *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2). Here the record shows painstaking care on the part of the trial court in the examination of the panel (R. 244–321).[14] Petitioners emphasize (Pet. I, 32; Pet. II, 23) that 22 of the 57 prospective jurors examined indicated that they had formed opinions with reference to the case. It does not follow that the selected jury was biased. Viewed in context, this circumstance reflects the care with which the jury was screened.

Petitioners rely heavily (Pet. I, 33; Pet. II, 24–25) upon *Delaney* v. *United States,* 199 F. 2d 107, 113 (C. A. 1), in which it was held that a careful *voir dire* examination could not properly screen out "preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." But that case is clearly distinguishable. There, the publicity was generated by Congressional committee hearings and had a direct relationship to the establishment in the public mind of the defendant's guilt. It was predicated upon investigative reports of the committee, a fact-finding body. The publicity in the instant case consisted of accounts of the pre-trial proceedings—proceedings which obviously involved no determinations as to the merits. If because of the noto-

[14] It is also significant that the selection of veniremen was not limited to the city of Denver, where the case was tried, but extended to a large portion of Colorado.

riety of the individuals involved, the publicity was greater than usually obtains in criminal cases, that alone did not warrant a change of venue. See *Shockley* v. *United States,* 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; cf. *United States* v. *Rosenberg,* 200 F. 2d 666, 668–669, (C. A. 2), certiorari denied, 345 U. S. 965.[15]

5. Petitioners Calvaresi and Benallo, relying on *Kotteakos* v. *United States,* 328 U. S. 750, assert (Pet. I, 21–23) that they were prejudiced by being tried with one another and with other defendants. The suggestion is that the evidence showed a number of separate conspiracies, each relating to a separate episode of jury tampering; that there was insufficient proof to establish that Calvaresi and Benallo were parties to any general conspiracy; and that joinder of indictments was improper since the offenses in question did not involve the same acts or transactions or a common scheme or plan. It is also suggested that, at a minimum, there were two conspiracies, one relating to the effort to influence the June panel and the other to influence the September panel; that it is, indeed, inconceivable that conspirators undertaking to corrupt the June panel would an-

[15] The claim of petitioners Calvaresi and Benallo (Pet. I, 31), that this Court's ruling in *Shepherd* v. *Florida,* 341 U. S. 50, is applicable to the instant case, is without merit. There was evidence, in that case, of actual terrorism extending to the court room so as to deny the defendants their rights to due process. This is not such a case.

ticipate a mistrial and plan, *ab initio* to influence a subsequent panel; and that there is nothing to connect those petitioners with the June conspiracy.

As the Court of Appeals held, the evidence abundantly established a general, overall plan which had as its single and consistent purpose the procurement of Eugene Smaldone's acquittal in his criminal tax case. The evidence showed further that Calvaresi and Benallo separately importuned Mrs. Alsup for this very purpose. It is also inferable that these petitioners knew that the Smaldones were enlisting other persons to further the object in view by importuning other jurors. They were aware that there was no assurance that Mrs. Alsup would actually sit on the Smaldone tax case and that the chances of procuring an acquittal bore a direct ratio to the number of persons on the panel who would be prepared to abandon their obligations. In fact, Calvaresi advised Mrs. Alsup that if she did not accept the proffered bribe someone else would get it.

It is plain, in short, that there was a common, informed purpose in the various efforts to influence the individual jurors and that these efforts were part and parcel of the same continuing scheme. The situation is thus markedly different from that involved in *Kotteakos* and closely akin to that presented by *Blumenthal* v. *United States,* 332 U. S. 539. As this Court

stated in the latter case (p. 557), "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."

The argument that, at the least, there must have been two independent conspiracies has no substance. It is immaterial whether those who planned to influence the June panel foresaw the possibility of a mistrial (an eventuality, it may be noted parenthetically, hardly remote). The short answer is that the ultimate and unchanging object of the scheme—Smaldone's acquittal—had not been realized when the mistrial occurred. There is no evidence that the scheme was abandoned at that point and there is affirmative evidence (the legal presumption of continuity aside) that it continued. The fact that the bribery efforts of Calvaresi and Benallo were directed to a member of the September panel is likewise immaterial. One who enters a continuing conspiracy cannot evade responsibility for acts occurring prior to his entry.

Another contention based on allegedly improper joinder is raised by petitioners Eugene

and Clyde Smaldone (Pet. II, 17–21). Although their conviction on the conspiracy charges for which they were tried was reversed (on the ground that the indictment charged the same offenses as the conspiracy indictment to which they pleaded guilty), they urge that they did not receive a fair trial because evidence which would have been inadmissible on the substantive counts was admitted on the conspiracy counts. However, since Calvaresi and Benallo were properly tried for conspiracy, all evidence relating to the conspiracy was properly introduced. The conviction of the Smaldones on the substantive counts had to be based on the evidence relating to those specific counts.[16] Moreover, the substantive counts were based on the same overt acts involved in the conspiracy counts, and the evidence showed such direct participation of the Smaldones in so many overt acts that any slight additional evidence relating to co-conspirators which might have been admitted against them must have been cumulative. There is thus no showing of prejudice.

6. Petitioners argue, for the first time in this Court (Pet. I, 18–20; Pet. II, 30–32), that, since the Government proved but one overall conspiracy, consecutive sentences could not be imposed on the basis of each of the two counts of the

[16] Petitioners were apparently satisfied with the charge, which is not included in the record. Presumably, therefore, it correctly charged as to the evidence tending to prove the substantive offenses.

conspiracy indictment. We concede that this contention is sound. *Braverman* v. *United States,* 317 U. S. 49, 53. As to Calvaresi and Benallo, however, the question is academic. They received suspended sentences on both counts of the conspiracy indictment; they were not placed on probation in consequence of such suspension; and the sentences were made to run concurrently with the sentences on the substantive counts. See *Pinkerton* v. *United States,* 328 U. S. 640, 641–642.

Eugene and Clyde Smaldone, on their pleas of guilty to the two counts of conspiracy indictment No. 13833, were sentenced to consecutive terms. Since the counts to which they pleaded guilty charged, on their face, two offenses, the nature of the evidence to support the conviction based on that pleading would not normally be open for review. See *Harlan* v. *McGourin,* 218 U. S. 442; *Eury* v. *Huff,* 146 F. 2d 17 (C. A. D. C.). But in view of the fact that the court below found the indictment in No. 13800 to cover the same matters as the indictment in No. 13833, and the proof under No. 13800 established only one offense, we agree that one of the five-year sentences resting on conspiracy indictment No. 13833 should be vacated. We believe, however, that relief should properly be sought by way of a motion in the District Court under Rule 35, F. R. Crim. P., to correct sentence rather than on the petition for certiorari, since petitioners failed to

make a motion at the time of their plea that the Government elect upon which count to proceed and since they failed to raise the issue in the District Court or in the Court of Appeals.[17] [18]

CONCLUSION

The sentences imposed upon the petitioners in these cases were undeniably severe. Justice in criminal cases depends not only upon the fairness of procedures during the trial but upon the reasonableness of the sentence imposed in the event of conviction. It is unfortunate when sentences in a serious case have not received, together with the other aspects of the case, the benefit of independent examination by an appellate tribunal.

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[17] The same procedure should be followed in correcting the error (which we concede) asserted by petitioner Clyde Smaldone at Pet. II, p. 17, note 9.

[18] The contention of petitioners Eugene and Clyde Smaldone (Pet. II, 35–39) that the sentencing judge had no power to impose sentences upon them under indictment No. 13833 because another judge of the court took their guilty pleas thereto is frivolous. Both judges were members of the same court with coordinate and concurrent jurisdiction. Thus, either one had the power to impose the sentence. *Owens* v. *Hunter*, 169 F. 2d 971, 972 (C. A. 10). Petitioners themselves admit (Pet. II, 37) that their sentences were not void. Nor do they claim that they were in any way prejudiced by such sentencing. Although, ordinarily, within the spirit of Rule 25, F. R. Crim. P., the judge who accepts the plea of guilty should also impose the sentence, the instant situation was not ordinary—conspiracy indictment No. 13833 was based upon the same transactions involved in all the other indictments upon which sentences were to be pronounced, and, furthermore, the sentencing judge was requested by the other judge to impose the sentence (R. 485).

The absence of authority for appellate review of sentences is a weakness in our jurisprudence.

But this Court cannot assume that the sentences here are, under the circumstances, excessive. If the question were reviewable, the record would doubtless reflect what is not now in the record, namely, the detailed reasons brought to the attention of the trial court which led to the imposition of the sentences. The factual context of the case was fully developed before the sentencing judge; it is not before this Court.

In any event, this Court has indicated that federal appellate tribunals cannot review sentences which are within the statutory limits. As Judge Learned Hand, expressing the prevailing view of the law, observed in a case in which he believed that the sentencing power had been unwisely exercised, "We are not ourselves able to intervene, though if we could, we should not hesitate to do so." *Nash* v. *United States*, 54 F. 2d 1006, 1008 (C. A. 2). In our view, no other aspect of the instant case warrants the Court's intervention.

Respectfully submitted,

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No. 538. CALVARESI ET AL. *v.* UNITED STATES; and No. 548. SMALDONE ET AL. *v.* UNITED STATES. On petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge. *A. X. Erickson, W. H. Erickson* and *Albert E. Sherlock* for petitioners in No. 538. *Peyton Ford, Alan Y. Cole* and *F. E. Dickerson* for petitioners in No. 548. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 216 F. 2d 891.